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NATURAL RESOURCES AND NATURAL LAW PART I: PRIOR APPROPRIATION

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ABSTRACT

In recent years, there has been a resurgence of civil disobedience over public land policy in the West, sometimes characterized by armed confrontations between ranchers and federal officials. This trend reflects renewed assertions that applicable positive law violates the natural rights (sometimes of purportedly divine origin) of ranchers and other land users, particularly under the prior appropriation doctrine and grounded in Lockean theories of property. At the same time, Native Americans and environmental activists have also relied on civil disobedience to assert natural rights to a healthy environment based on public trust, fundamental human rights, and other principles. This Article explores the legitimacy of natural law assertions that prior appropriation justifies private property rights

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in federal grazing resources. A subsequent article will evaluate the legitimacy of related assertions of natural law to support the public trust doctrine and other legal theories to support environmental protection.

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INTRODUCTION

In recent years, there has been a resurgence of civil disobedience to support natural law-based arguments regarding public lands and other resources.[1] Some property rights advocates, particularly a discrete group of western ranchers, rely in part on a form of natural law that might be characterized as rigidly prescriptive,[2] and often theistic.[3] Environmental advocates rely on public trust principles and assertions of fundamental human rights that also have potential origins in natural law.

Both groups raise essential questions about the extent to which land and other natural resources are public or private, their legitimate uses, and the protections they deserve. Reconciling the validity of these claims is deceptively difficult. Neither side can reject the claims of the other by asserting the invalidity of natural law per se to interpret or fill in gaps in positive law, without undercutting the validity of their own arguments.

This Article evaluates the source and applicability of the prior appropriation doctrine to support some western ranchers' claims to property rights in public grazing lands and resources.[4] This Article does not challenge the legitimacy of using civil disobedience to support those arguments. There is a long and noble history in the United States of using civil disobedience to protest government action or inaction, and to propose legal reform[5] based on alternative

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1. *See* Matthew Piper, *Jury Finds Defendants Not Guilty of Federal Charges in Oregon Standoff*, SALT LAKE TRIB. (Oct. 28, 2016, 3:34 PM), http://archive.sltrib.com/article.php?id=4515803&itype=CMSID [https://perma.cc/BM4S-BD5Z].

2. *See* Kevin Sullivan & Juliet Eilperin, *In the Nevada Desert, Bundy Family Warns of Another Standoff*, WASH. POST (Nov. 1, 2016), https://www.washingtonpost.com/national/2016/11/01/c45bdf4e-a04c-11e6-a44d-cc2898cfab06_story.html?utm_term=.9390e7735a99 [https://perma.cc/5ZZP-8KUK].

3. *See* Sophia June, *Bundy Supporters Celebrate Acquittal with a Shofar Performance*, WILLAMETTE WK. (Nov. 8, 2016), https://www.wweek.com/news/2016/10/27/bundy-supporters-celebrate-acquittal-with-a-shofar-performance/ [https://perma.cc/D4SR-T2SS]; Piper, *supra* note 1.

4. In a future article, I will evaluate the source and application of the public trust doctrine to support a range of new environmental protections.

5. *See* Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 68 (1990).

interpretations of law by discrete communities.[6] There is an important difference, however, between the legitimacy of civil disobedience as a tactic to advocate reform, and the legitimacy of the reforms sought. Likewise, there is a difference between nonviolent protest and the use of firearms, but that is also not my topic.

A. Resurgence of Civil Disobedience

When an Oregon jury acquitted the defendants in a federal prosecution for alleged offenses related to the armed occupation of the Malheur National Wildlife Refuge, defendant Shawna Cox proclaimed triumphantly that "[w]e have God-given rights"[7] and "I pray that [people] understand that God gives us rights, not the government. The government doesn't have any rights."[8] Her proclamation mirrors the views of ranchers in Nevada and elsewhere who dispute the validity of federal land control.[9]

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6. *See* Robert M. Cover, Nomos *and Narrative*, 97 HARV. L. REV. 4, 50-52 (1983) (identifying willingness to endure the consequences of civil disobedience as a measure of commitment to alternative legal interpretations formed by discrete communities).

7. June, *supra* note 3; *see also* Leah Sottile, *Jury Acquits Ammon Bundy, Six Others for Standoff at Oregon Wildlife Refuge*, WASH. POST (Oct. 27, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/10/27/jury-acquits-leaders-of-armed-takeover-of-the-oregon-wildlife-refuge-of-federal-conspiracy-charges/?noredirect=on&utm_term=.a2bbaffd1a21 [https://perma.cc/XQ3B-F472] (reporting Ms. Cox to have said "Wake up America, and help us restore the Constitution").

8. Piper, *supra* note 1. Ms. Cox was also seen praying with former Utah State Senator Mike Noel before willfully violating federal restrictions on motorized vehicle use through federal land. *See* Christopher Smart, *Mike Noel Warned Utah Woman Arrested in Oregon Standoff Not to Go*, SALT LAKE TRIB. (Jan. 28, 2016, 7:40 AM), http://archive.sltrib.com/article.php?id=3467893&itype=CMSID [https://perma.cc/2Y8L-9G2E].

9. *See* John Dougherty, *Bundy Trial Dismissed: 'A Sad Day for America's Public Lands'*, REVELATOR: ECOWATCH (Jan. 10, 2018, 8:55 AM), https://www.ecowatch.com/bundy-trial-verdict-2524188297.html [https://perma.cc/M26G-EK8Y] (describing his own defense in the criminal prosecution regarding the Clark County, Nevada standoff with federal officials, Cliven Bundy said: "My defense is a 15-second defense: I graze my cattle only on Clark County, Nev., land and I have no contract with the federal government.... This court has no jurisdiction or authority over this matter. And I've put up with this court in America as a political prisoner for two years"); Ken Ritter, *2 in Nevada Standoff Case Take Plea Deals, Avoid 3rd Trial*, SALT LAKE TRIB. (Oct. 24, 2017), https://www.sltrib.com/news/2017/10/24/2-in-nevada-standoff-case-take-plea-deals-avoid-3rd-trial/ [https://perma.cc/L74U-LTGG] ("Cliven Bundy says he doesn't recognize federal authority over public land where he said his family grazed cattle since the early 1900s. His dispute echoes a nearly half-century fight over public lands involving ranchers in Nevada and the West, where the federal government controls vast expanses of land.").

The Malheur verdict might be explained as jury nullification.[10] The defendants argued "that they were protesting government overreach and posed no threat to the public."[11] However, the argument that one can overcome violations of federal criminal statutes by proclaiming God-given rights, or some other form of fundamental law, cannot be dismissed as the views of one or more lay defendants. The government convicted some Malheur defendants in a separate trial,[12] but a jury also acquitted some defendants prosecuted for the armed standoff with federal officials at the Bundy Ranch that led to the Malheur protest.[13] A federal judge later dismissed charges against the Bundys because of prosecutorial misconduct in withholding evidence from the defendants, engendering mixed reactions ranging from fear that the result would further provoke militia movements to vindication of the defendants' views.[14] Moreover, this

10. *See generally* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150-52, 1159 (1997) (defining jury nullification as "a jury's ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a criminal statute," and challenging the notion that nullification presumptively poses a threat to the rule of law).

11. *See* Courtney Sherwood & Kirk Johnson, *Bundy Brothers Acquitted in Takeover of Oregon Wildlife Refuge*, N.Y. TIMES (Oct. 27, 2016), https://www.nytimes.com/2016/10/28/us/bundy-brothers-acquitted-in-takeover-of-oregon-wildlife-refuge.html [https://perma.cc/T4R5-8QBL].

12. *See* Maxine Bernstein, *Two Convicted and Two Acquitted of Conspiracy in Oregon Occupation Trial*, OREGONIAN: OREGONLIVE (Mar. 11, 2017), https://www.oregonlive.com/oregon-standoff/2017/03/oregon_occupation_trial.html [https://perma.cc/S29E-B85R].

13. *See* Julie Turkewitz, *No Guilty Verdicts in Bundy Ranch Standoff Trial*, N.Y. TIMES (Aug. 22, 2017), https://www.nytimes.com/2017/08/22/us/bundy-trial-nevada-verdict.html [https://perma.cc/Y8UY-QA5H]; Joshua Zaffos, *The Bundy Bust-Up*, HIGH COUNTRY NEWS (Mar. 8, 2016), https://www.hcn.org/articles/Bundy-bust-up-cliven-ammon-malheur-sage brush-rebellion-payne-santilli [https://perma.cc/YL6R-LWHD] (describing the 2014 standoff between armed ranchers and federal law enforcement officials).

14. *See* Robert Anglen, *Cliven Bundy Walks Free as Federal Judge Dimisses Bundy Ranch Standoff Case*, REPUBLIC (Jan. 8, 2018, 8:16 PM), https://www.azcentral.com/story/news/local/arizona-investigations/2018/01/08/cliven-bundy-ranch-standoff-case-retried-federal-court-ruling/1008051001/ [https://perma.cc/N98X-LAMV] (reporting that Cliven Bundy left the courtroom to cheers of "liberty" and "freedom"); Dougherty, *supra* note 9 (presenting opposing reactions to the dismissal); David French, *Cliven Bundy Wins: Judge Cites 'Flagrant' Federal Misconduct*, NAT'L REV. (Jan. 9, 2018, 4:00 PM), https://www.nationalreview.com/2018/01/cliven-bundy-case-dismissed-judge-gloria-navarro-cites-flagrant-federal-misconduct-bureau-land-management/ [https://perma.cc/6DWS-64MK] (expressing fears that the dismissal would embolden Bundy supporters); Tom Porter, *Cliven Bundy Mistrial: How a Nevada Rancher Became an Icon for the Far-Right Militia Movement*, NEWSWEEK (Jan. 11, 2018, 11:48 AM), https://www.newsweek.com/cliven-bundy-mistrial-how-nevada-rancher-became-icon-far-right-militia-776727 [https://perma.cc/TMQ4-3BNA]; Amelia Templeton et al., *The Bundys Go Free*

was not the first time that western ranchers had disobeyed positive law to protest or resist what they viewed as excessive federal control of their livestock and grazing lands.[15]

At the other side of the political-environmental spectrum, advocates have also recently resorted to civil disobedience to protest actions that may contribute to climate change.[16] Environmentalists hail judicial willingness to consider that defense as "groundbreaking" and "precedent-setting."[17]

B. Resurgence of Natural Law

Some ranchers cite natural law in various forms to claim vested property rights in public lands. Combining prior appropriation of water and forage, Cliven Bundy reportedly told a Ph.D candidate researching early Mormon views of public land policy that, "[f]rom the moment their ancestors' horses took a sip of water or ate the grass, 'a beneficial use of a renewable resource' was created."[18]

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in Nevada—And Their Dismissal Reverberates Across Oregon, OR. PUB. BROADCASTING (Jan. 8, 2018, 5:37 PM), https://www.opb.org/news/article/cliven-bundy-nevada-oregon-bureau-land-management-government-case-dismissed/ [https://perma.cc/XK8E-BV6F] (citing views of "militia" and "patriot groups" that the dismissal vindicated their beliefs).

15. *See, e.g.*, Light v. United States, 220 U.S. 523, 535 (1911) (describing a rancher's threat to resist a government effort to prevent illegal grazing); Chournos v. United States, 193 F.2d 321, 323 (10th Cir. 1951) (describing open defiance of Range Manager's order to keep livestock off particular federal lands); Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 804-05 (2005) (quoting a *High Country News* article from 2000 regarding retaking by ranchers of cattle seized by Bureau of Land Management officials for unpermitted grazing in National Monument).

16. *See, e.g.*, State v. Klapstein, No. 15-CR-16-414, Order & Mem. at 5-6 (Minn. 9th Dist. Ct. Oct. 11, 2017) (preserving necessity defense in criminal trespass case involving four climate change protesters' actions to close public utility pipelines, but explaining high burden to prove necessity based on "danger of imminent physical harm" and "a direct causal connection between breaking the law and preventing the harm"); Blake Nicholson, *Activist on Trial Wants More Time for 'Necessity' Defense*, U.S. NEWS (Nov. 3, 2017, 1:40 PM), https://www. usnews.com/news/best-states/north-dakota/articles/2017-11-03/activist-on-trial-wants-more-time-for-necessity-defense [https://perma.cc/4L5D-SX8N] (describing efforts by Standing Rock protester to invoke necessity defense to justify civil disobedience). *But see* State v. Sahr, 470 N.W.2d 185, 193 (N.D. 1991) (rejecting assertion of necessity defense in criminal trespass case against abortion protesters).

17. *See* Jessica Corbett, *Victory for 'Valve Turners' as Judge Allows 'Necessity Defense' for Climate Trial*, COMMON DREAMS (Oct. 17, 2017), https://www.commondreams.org/news/2017/10/17/victory-valve-turners-judge-allows-necessity-defense-climate-trial [https://perma.cc/7WB4-V9KV].

18. Betsy Gaines Quammen, *The War for the West Rages On*, N.Y. TIMES (Jan. 29, 2016),

Speaking in his own defense at the trial over the Bunkerville, Nevada armed standoff, Cliven's son, Ryan Bundy, asserted "inalienable rights" to grazing on public lands.[19] Some ranchers signed, and others considered signing, letters to the federal government "denying federal authority to regulate grazing" on federal lands, and unilaterally revoking their own grazing permits.[20] Some lawyers who represent ranchers have asserted similar claims in law journals and elsewhere.[21]

It is difficult to know how many ranchers assert property rights to federal lands through prior use, but I do not presume that these views are universal. Apparently, at least a significant number of

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https://www.nytimes.com/2016/01/30/opinion/the-war-for-the-west-rages-on.html [https://perma.cc/G7NA-6R83] (quoting Cliven Bundy). Bundy then reportedly said:

> That's how our rights are created.... So now we have created them and we use them, make beneficial use of them, and then we protect them. And that's sort of a natural law, and that's what the rancher has done. That's how he has his rights. And that's what the range war, the Bundy war, is all about right now, it's really protecting those three things: our life, liberty and our property.

Id.

19. *See* Tay Wiles, *How Ryan Bundy Sees the West*, HIGH COUNTRY NEWS (Nov. 20, 2017), https://www.hcn.org/issues/49.22/justice-how-ryan-bundy-sees-the-west-cliven-bundy-bunkerville-trial/ [https://perma.cc/N4B9-XRM2]; *see also* R. MCGREGGOR CAWLEY, FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS 12-13, 118-19, 123-42 (1993) (dating calls for privatization of federal lands to at least 1973, grounded in libertarian economic theory and political philosophy); WAYNE HAGE, STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS 84-86 (3d ed. 1994) (linking alleged rights of western settlers to natural law theory); Nora Simon, *Oregon Standoff: A Timeline of How the Confrontation Unfolded,* OREGONLIVE (Feb. 9, 2017, 3:51 PM), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/oregon_standoff_a_timeline_of.html [https://perma.cc/Q23B-2HLB]; Sullivan & Eilperin, *supra* note 2.

20. *See* Tay Wiles, *Malheur Occupation Impacts Linger Throughout the West*, HIGH COUNTRY NEWS (Oct. 4, 2016), https://www.hcn.org/articles/ammon-bundy-malheur-standoff-effects-sagebrush-rebellion [https://perma.cc/4558-FU94] (describing New Mexico rancher Adrian Sewell's letter, which he subsequently appears to have withdrawn, and meetings at which Utah ranchers considered similar action). The form letters, addressed to the Solicitor General of the United States, read: "I am hereby giving notice of termination of all contracts between me and the Bureau of Land Management and United States Forest Service—I shall no longer require their help in managing my ranch." *Id.*

21. *See* Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 IDAHO L. REV. 505, 507-08 (1994); Marc Stimpert, *Counterpoint: Opportunities Lost and Opportunities Gained: Separating Truth from Myth in the Western Ranching Debate*, 36 ENVTL. L. 481, 484, 486, 488 (2006); Wiles, *supra* note 19 (explaining that Cliven Bundy's lawyer, Bret Whipple, asserted his client had inalienable rights to grazing permits).

western ranchers share these views, but some prefer anonymity.[22] Other ranching representatives advocate balance between public and private uses and values on public lands.[23] Because of these diverse views, I refer to those ranchers and their attorneys who espouse natural rights views collectively as "natural law ranch advocates."

These natural law claims also resonate with the populist description of western rugged individualism in popular literature and film.[24] The rugged individualism narrative might help explain the jury verdicts in the Malheur and Nevada standoff cases[25] in the face of significant evidence demonstrating federal law violations.[26]

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22. E-mail from Professor Michele Straube, Founding Dir., Envtl. Dispute Resolution Program: Wallace Stegner Ctr. for Land, Res. & Env't, to author (Aug. 30, 2018, 7:13 AM) (on file with author).

23. *See Toward a Productive & Healthy West*, W. LAND OWNER'S ALLIANCE, https://westernlandowners.org/wp-content/uploads/2017/09/Toward-a-Healthy-and-Productive-West.pdf [https://perma.cc/B8EX-QU5A] (undated statement sponsored by the Western Landowners Alliance, the Family Farm Alliance, the Rural Voices for Conservation Alliance, and Partners for Conservation, and signed by a large number of western ranches).

24. *See* George Cameron Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 539 n.17, 559 (1982) [hereinafter *Public Rangeland Management I*] (alluding to "parochial attitudes in the West" and "an antifederal attitude, sometimes labeled 'frontier individualism,'" and noting rancher "pride in a certain frontier individualism, usually manifested as opposition to all things federal except federal money"); Donahue, *supra* note 15, at 722, 740, 769-74, 790-803 (identifying and critiquing the "cowboy myth" as it relates to federal grazing policies). *But see* Stimpert, *supra* note 21, at 524-29 (defending the legitimacy of western ranching families, lifestyles, and economies); Cheryl K. Chumley, *Cliven Bundy Case Highlights What Ronald Reagan Warned*, WASH. TIMES (Jan. 9, 2018), https://www.washingtontimes.com/news/2018/ jan/9/cliven-bundy-case-highlights-what-ronald-reagan-wa/ [https://perma.cc/N7P8-BVMB] (lauding Bundy dismissal as victory of "[w]estern cowboy pragmatism and independence [over] East Coast elitism").

25. *See* Sottile, *supra* note 7 ("For these defendants and these people, having a firearm ... [is] as much a statement of their rural culture as a cowboy hat or a pair of jeans. I think the jury believed at the end of the day that that's why the guns were there." (quoting defense attorney Michael Schindler)).

26. In the Malheur prosecution, federal prosecutors produced significant physical evidence that defendants illegally possessed and used firearms on federal property. *See* Press Release, Dep't of Justice, Dist. of Nev., Fourteen Additional Defendants Charged for Felony Crimes Related to 2014 Standoff in Nevada (Mar. 3, 2018), https://www.justice.gov/usao-nv/pr/fourteen-additional-defendants-charged-felony-crimes-related-2014-standoff-nevada [https://perma.cc/BSU8-HEKH]. In a later prosecution, however, a federal jury convicted four of the other participants on felony conspiracy and other charges. *See* Dougherty, *supra* note 9. The District Court dismissed charges in one of the Bundy Ranch prosecutions on procedural grounds. *See id.*

Similarly, some environmentalists argue that civil disobedience is necessary due to positive law's failure to prevent or mitigate climate change or other environmental harms, relying on arguments that sound in natural law.[27]

Renewed reliance on natural law is not limited to the legal and policy debate over public lands, climate change, or other natural resources. Some recent scholarship calls for the resurgence of natural law,[28] and arguments grounded in natural law pervade divisive aspects of the nation's current political discourse. Opponents of same-sex marriage,[29] opponents of publicly required insurance for birth control,[30] proponents of the right to bear arms,[31] and advocates for religious liberty have invoked natural law.[32] The belief that religiously based natural law can override positive law is resurging in widespread ways that may also reflect changes in the U.S.

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27. *See supra* note 16 and accompanying text; *infra* CONCLUSION.B.

28. *See* Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 NOTRE DAME L. REV. 1245, 1275 (2012); Daniel R. Heimbach, *Natural Law in the Public Square*, 2 LIBERTY U. L. REV. 685, 685-86 (2008); R. H. Helmholz, *Judicial Review and the Law of Nature*, 39 OHIO N.U. L. REV. 417, 434 (2013); Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33, 86 (1997).

29. *See* Manya A. Brachear, *Gay Marriage vs. Natural Law: Catholic Leaders Take Different Tack as State Lawmakers Near Action*, CHI. TRIB. (Dec. 30, 2012), https://www.chicagotribune.com/news/ct-xpm-2012-12-30-ct-met-gay-marriage-natural-law-20121230-story.html [https://perma.cc/Y8GJ-FMXH] (quoting Chicago Cardinal Francis George as objecting that "[m]arriage comes to us from nature").

30. *See* David Ingram, *White House Fights Catholic Church Subpoena on Birth Control*, HUFFINGTON POST (Apr. 6, 2013, 8:37 PM), https://www.huffingtonpost.com/2013/04/05/white-house-fights-catholic-church_n_3024899.html [https://perma.cc/2DYN-A5GP] ("The Catholic Church teaches that artificial birth control is sinful because it violates natural law.").

31. *See* Andrew P. Napolitano, *Guns and Freedom*, FOX NEWS (Jan. 10, 2013), http://www.foxnews.com/opinion/2013/01/10/guns-and-freedom.html [https://perma.cc/F6NE-X8W2] (rooting the right to bear arms in the Declaration of Independence and its invocation of "the ancient principles of the natural law that have animated the Judeo-Christian tradition in the West").

32. *See* Paula K. Gerrett, *Kim Davis Isn't Fighting for Religious Freedom*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/entry/kim-davis-isnt-fighting-for-religious-freedom_b_8080008.html [https://perma.cc/5LPN-RKPN] (arguing that the debate over Kentucky County Clerk Kim Davis's refusal to conduct gay marriages "isn't actually about gay marriage or religious freedom. This debate is over civil v[ersus] natural law, and it's a debate that we have engaged in throughout history. It is about the meaning of law in this country. Indeed, it is about the very soul of democracy.").

political climate, including the wave of populist supporters who elected President Donald Trump.[33]

In its most extreme form, proponents of theologically grounded natural law suggest that their obligation to obey civil law is secondary to their religious beliefs. An organization called "DependenceonGod.com" published advertisements in major daily newspapers proclaiming a "Declaration of Dependence Upon God and His Holy Bible," signed by Evangelical religious leaders, business owners, attorneys, and politicians.[34] One Bundy supporter cited the dismissal of their prosecution as a case of divine intervention, and linked the public land debate to other issues of conservative social policy: "There's a higher power in control.... Federal land is going to go back to the states. Abortion is going to stop, same-sex marriage is going to stop. Otherwise God is going to destroy this country."[35] These assertions of theocratic supremacy are reminiscent of the divide among Puritans in the Massachusetts Bay Colony, a debate one author asserts has not yet been resolved in the United States.[36]

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33. *See* David Leonhardt, *Trump Flirts with Theocracy*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/opinion/trump-flirts-with-theocracy.html [https://perma.cc/YHU6-V6KN]; Sarah Pulliam Bailey, *Photo Surfaces of Evangelical Pastors Laying Hands on Trump in the Oval Office*, WASH. POST (July 12, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/07/12/photo-surfaces-of-evangelical-pastors-laying-hands-on-trump-in-the-oval-office/?utm_term=.ced22fdbdf05 [https://perma.cc/X8G2-6RQJ].

34. *Declaration of Dependence Upon God and His Holy Bible*, N.Y. TIMES, Sept. 25, 2016, at B3. The "Declaration" begins with the same words as the Declaration of Independence and adds: "Since our Creator gave us these rights, we declare that no government has the right to take them away. Among these rights is the right to exercise our Christian beliefs as put forth in God's Holy Bible." *Id.* After proclaiming that these include specific rights such as life beginning at conception, and marriage as a union between one man and one woman, the document asserts the signatories' "constitutional rights as Americans to follow these time honored Christian beliefs—commit to conducting our churches, ministries, businesses, and personal lives in accordance with our Christian faith *and choose to obey God rather than man*." *Id.* (emphasis added); *see also* Quammen, *supra* note 18 (arguing that the difference between the Bundys and other ranch advocates is that the Bundys "believe God is on their side").

35. Templeton et al., *supra* note 14.

36. *See* JOHN M. BARRY, ROGER WILLIAMS AND THE CREATION OF THE AMERICAN SOUL: CHURCH, STATE, AND THE BIRTH OF LIBERTY 151, 206 (2012) (describing the debate over "the role of government in religion and of the reverse, the role of religion in the government" as "a fissure in America, a fault line which would rive America all the way to the present"); *see also* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 230 (2016) (identifying Calvinist roots in extreme libertarian market theories among those who "crusaded against abortion, homosexuality, feminism, and modern science that conflicted with their teachings").

C. The Tension with Positive Law

As explained in detail in Part II,[37] federal authority over public natural resources rests on the positive law in the Property Clause of the U.S. Constitution, statutes and regulations adopted pursuant to that authority, and judicial decisions interpreting those texts.[38] The Property Clause grants the federal government plenary authority over its public lands.[39] Federal courts have upheld a significant body of federal land management statutes[40] against challenges to their scope and effect.[41] Courts have rejected claims challenging the legitimacy of federal regulation of grazing on federal land,[42] or asserting private property rights to those lands.[43] Most recently, in a federal government trespass action against a vocal natural law ranch advocate, the Ninth Circuit held that existing water rights did not support an easement by necessity to graze livestock on public lands without a permit.[44]

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37. *See infra* Part II.B.1.

38. U.S. CONST. art. IV, § 3, cl. 2; *see* Coggins et al., *supra* note 24, at 569-72, 593-94.

39. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 539-40 (1976).

40. *See* Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-87 (2012); National Park Service and Related Programs, 54 U.S.C. §§ 100101-104907 (Supp. II 2014); National Forest Management Act of 1976, 16 U.S.C. §§ 1600-1614 (2012).

41. *See, e.g.*, Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 854 (9th Cir. 2002) (upholding federal authority over national wildlife refuges).

42. *See* McKelvey v. United States, 260 U.S. 353, 359-60 (1922) (upholding conviction for obstructing passage of competing grazing users over public land); Light v. United States, 220 U.S. 523, 538 (1911) (upholding injunction against grazing on federal forest reserve without required permit); Camfield v. United States, 167 U.S. 518, 528 (1897) (upholding constitutionality of Unlawful Enclosures Act); Diamond Ring Ranch, Inc. v. Morton, 531 F.2d 1397, 1403-04 (10th Cir. 1976) (upholding federal authority to revoke grazing permits for regulatory violations); Chournos v. United States, 193 F.2d 321, 323 (10th Cir. 1952) (upholding requirement for grazing permits and holding that a "livestock owner does not have the right to take matters into his own hands and graze public lands without a permit").

43. United States v. Fuller, 409 U.S. 488, 494 (1973) (rejecting argument that the Fifth Amendment required compensation for value of grazing permits because permits were revocable and conveyed no property rights); United States v. Cox, 190 F.2d 293, 296 (10th Cir. 1951) (holding that in determining just compensation for lands appropriated for military purposes, the jury could not consider value due to grazing permits); Osborne v. United States, 145 F.2d 892, 895-96 (9th Cir. 1944) (holding that condemnation of ranch for military purposes did not require compensation for value added by federal grazing permits, which were mere revocable licenses).

44. *See* United States v. Estate of Hage, 810 F.3d 712, 719-20 (9th Cir. 2016). E. Wayne Hage, now deceased, authored STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS, asserting rights to graze on public lands based on natural law. *Supra* notes 18-20 and

Natural law ranch advocates seek to refute this seemingly overwhelming body of positive law through arguments of three distinct kinds, reflecting different variations of natural law theory. At one level, the theistic rhetoric used by Ms. Cox, the Bundys, and others suggests a version of natural law in which religious precepts alone are sufficient to override human positive law.[45] That set of claims is most summarily refuted as inconsistent with basic principles of separation of church and state incorporated in the Establishment Clause of the First Amendment,[46] and with contemporary American legal thought and method.[47]

Viewed through a nonreligious lens, however, natural law ranch advocates also assert two additional layers of natural law arguments. First, there is a strong component of strict constructionist constitutionalism in the views expressed by the Bundy family and their allies, with an implication that the Constitution guarantees ranchers certain inalienable rights to property and economic liberty.[48] Second, natural law ranch advocates argue that the right to public grazing resources parallels the legal justification for the prior appropriation doctrine in western water law, which arguably has groundings in natural law.[49] They assert that grazing resources are as essential as water to western economies and ways of life, and are therefore similarly subject to natural rights of appropriation; and that ranchers and their forebears applied their labor to grazing resources just as they did for water, justifying associated property rights.[50]

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accompanying text. His son, Wayne N. Hage, also refused to obtain grazing permits to use public lands, and was also a defendant in the case. *See Estate of Hage*, 810 F.3d at 715-16.

45. *See supra* notes 7-8, 34 and accompanying text.

46. U.S. CONST. amend. I; *see infra* Part I.A.3.

47. *See infra* notes 204-29 and accompanying text.

48. *See* Quammen, *supra* note 18; Wiles, *supra* note 19.

49. *See infra* Part II.A.1. On the basic principles of prior appropriation law, see generally ROBERT W. ADLER, ROBIN K. CRAIG & NOAH D. HALL, MODERN WATER LAW: PRIVATE PROPERTY, PUBLIC RIGHTS, AND ENVIRONMENTAL PROTECTIONS 1, 87-92 (2013).

50. *See* Falen & Budd-Falen, *supra* note 21, at 507-08, 522; Stimpert, *supra* note 21, at 484-88, 494; Todd Macfarlane, *A Realistic Assessment of Utah's Role in the Current Public Lands Debate*, RANGEFIRE (Jan. 20, 2017), http://rangefire.us/2017/01/20/a-realistic-assessment-of-utahs-role-in-the-current-public-lands-debate-by-todd-macfarlane/ [https://perma.cc/8THY-JBAL]; Quammen, *supra* note 18. *But see generally* George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1 (1982) [hereinafter *Public Rangeland Management II*]

This Article explores the legitimacy of natural law ranch advocates' arguments that the right to graze is analogous to the right to water by prior appropriation. Part I places the natural law ranch advocates' arguments in context with a brief review of natural law in U.S. legal history. Part I also demonstrates that the first two layers of natural law argument described above were never recognized widely in U.S. constitutional law, and have been rejected even if once part of the U.S. legal tradition. Part II evaluates the prior appropriation issue in more detail, and suggests legitimate reasons why grazing on public lands has been, and should be, treated differently from appropriating water resources, as a matter of both positive and natural law reasoning. This Article concludes by explaining how resolution of the prior appropriation issue leads inexorably to a similar issue regarding the natural law basis for the public trust doctrine, which will be addressed in a later article.

I. NATURAL LAW IN U.S. LEGAL HISTORY

Natural law is the subject of extensive literature[51] dating to Greek and Roman legal philosophers,[52] and it is neither prudent nor necessary to attempt an exhaustive explanation here. Some background is essential, however, to understand the potential role of different natural law theories in ownership and control of public resources, and the propriety of relying on natural law to advocate for changes in positive law. Section A provides a primer on natural law and its history, with a focus on the three layers of claims suggested by natural law ranch advocates. Section B distills from this analysis some key principles relevant to the manner in which natural law and positive law might apply to those claims.

(addressing the legitimacy of federal land ownership and authority from a constitutional and statutory perspective, though not addressing the natural law theories directly); Donahue, *supra* note 15, at 730-36; *Public Rangeland Management I*, *supra* note 24, at 568-77, 593-98.

51. For a collection of sources until the middle of the twentieth century, see generally Note, *Natural Law for Today's Lawyer*, 9 STAN. L. REV. 455 (1957).

52. *See* Arkes, *supra* note 28, at 1248 (dating natural law philosophy at least to Aristotle); Heimbach, *supra* note 28, at 689-91 (discussing natural law philosophy of Plato, Aristotle, and Cicero); Note, *supra* note 51, at 459 nn.9-12 (identifying roots of natural law in Greece and Rome).

A. Natural Law Primer

"Natural law" refers not to a single legal philosophy, but to a series of theories of law that have evolved significantly over time.[53] Although competing schools of natural law can reflect very different philosophies of what law is and from where it derives, differences are also explained by the social and political circumstances in which the theories arise.[54]

To the extent that natural law is united by a common idea, it is that some form of "fundamental law" exists through which positive law adopted by political bodies can be derived and evaluated.[55] The asserted source of that fundamental law has varied considerably, however, from revealed religion to human reason to a shared sense of morality within a polity.[56] Thus, although positive law and natural law could be seen as competing theories,[57] the two are not necessarily[58] mutually exclusive. Under this view, positive law is the means by which individual polities effectuate a society's interpretation of natural law,[59] implement natural law given varying

53. *See* Albert W. Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 PEPP. L. REV. 491, 493 (2009); David C. Bayne, *The Supreme Court and the Natural Law*, 1 DEPAUL L. REV. 216, 216 (1952); Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2269 (2001); Heimbach, *supra* note 28, at 688; Note, *supra* note 51, at 456-57, 456 n.2 (1957).

54. *See* John S. Harbison, *Hohfeld and Herefords: The Concept of Property and the Law of the Range*, 22 N.M. L. REV. 459, 461, 498 (1992) (arguing that all rights are "historically contingent," and that law "is a product of social forces and a carrier of cultural meanings").

55. *See* EVA H. HANKS ET AL., ELEMENTS OF LAW 474, 478 (1994); George, *supra* note 53, at 2269; Helmholz, *supra* note 28, at 418; Louis W. Hensler III, *A Modest Reading of St. Thomas Aquinas on the Connection Between Natural Law and Human Law*, 43 CREIGHTON L. REV. 153, 155 (2009); Note, *supra* note 51, at 457.

56. *See supra* note 55.

57. Note, *supra* note 51, at 473-74 (juxtaposing positive law and natural law as "opposing positions").

58. According to those who advocate absolute, and particularly theistic versions of natural law, one has an obligation to obey God's commands even in the face of contrary positive law. Under this view, natural law is not only necessary, but also sufficient, to create binding law even in the absence of positive law.

59. For example, natural law might suggest that killing is impermissible, but societies might differ in what constitutes self-defense, or whether the death penalty is justified.

circumstances,[60] or address matters not implicated by natural law.[61] Conversely, the legitimacy or moral justness of positive law can be assessed by reference to natural law. Legal positivism, by contrast, suggests a sharp distinction between law and morality to ensure fidelity to law independent of a judge's (or anyone else's) views of morality.[62]

1. Natural Law in the Medieval Catholic Tradition

Despite the historical importance of Greek, Roman, and earlier Christian natural law philosophy, the medieval Catholic tradition is a logical starting point because of its relevance to the theistic claims made by some natural law ranch advocates and some contemporary scholars.[63] St. Thomas Aquinas and other Catholic scholars in the Middle Ages posited that God handed down or "revealed" a set of fundamental moral precepts, such as the Ten Commandments, that humans were bound to obey.[64] Aquinas nonetheless believed that natural law was accessible to humans

60. For example, natural law might suggest that individuals must contribute to the general welfare, but one jurisdiction might choose property taxes and another one might select sales taxes.

61. For example, natural law may have nothing to say about procedures for registering automobiles to ensure the orderly administration of traffic safety.

62. For the classic modern defense of legal positivism, see H. L. A. HART, THE CONCEPT OF LAW 185-93 (3d ed. 2012); H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594-604 (1958) (explaining the evolution of legal positivism from the ideas of utilitarian theorists Bentham and Austin); *see also* Alschuler, *supra* note 53, at 495-97 (critiquing Justice Holmes's view that natural law held no legitimacy for law that must evolve constantly); Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1046 (1994) (quoting Justice Frankfurter's legal realism view that natural law is nothing more than "what sensible and right-minded men do every day"); R. George Wright, *Is Natural Law Theory of Any Use in Constitutional Interpretation?*, 4 S. CAL. INTERDISC. L.J. 463, 469-70 (1995) ("[Y]ou can invoke natural law to support anything you want." (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 50 (1980))). At least in the context of constitutional interpretation, however, Ely rejected the terminological distinction between "natural law" and "positivism" in favor of a distinction between "interpretivism" and "noninterpretivism." *See* ELY, *supra*, at 1.

63. For example, Robert George retains the theistic view that positive law is "morally good or bad—just or unjust—depending on its conformity to the standards of a 'natural,' (viz., moral) law that is no mere human creation." George, *supra* note 53, at 2269; *see also* Helmholz, *supra* note 28, at 417 (suggesting that natural law posits "a necessary connection between law and morality" implanted by God in the hearts of people).

64. *See* Note, *supra* note 51, at 475, 501 n.185.

because God implanted a fundamental sense of morality into their hearts.[65] Individual governments might manifest those precepts differently through their positive law; but if one believes these precepts come from deity, it is logical to view them as imperatives through which positive law must be judged.[66]

Thomastic natural law differs greatly from a view of revealed natural law in which individuals—as opposed to governments through legitimate authority—may decide whether to obey positive law.[67] For example, some of the Malheur defendants,[68] and a county clerk in Kentucky who refused to exercise her positive law responsibility to marry LGBT couples because it violated her religious beliefs, asserted the latter, extreme view.[69] However, because people are naturally inclined to live in ordered societies, and because it is difficult for humans to agree on all applications of natural law, one basic principle of natural law is that individuals must respect the positive law of their societies until changed.[70]

This disclaimer in Thomastic (and later) theories of natural law is challenging in the context of civil disobedience, and has troubled those who, at times in our history, believed aspects of positive law to be fundamentally immoral. The clearest example is slavery, which the United States affirmatively sanctioned as a matter of positive law in the U.S. Constitution,[71] before adoption of the

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65. *See* Helmholz, *supra* note 28, at 417.

66. *See id.* at 420-21. One of the debates that shook Puritan New England, however, was whether civil government should play any role in enforcing the "first table" of the Ten Commandments, those Commandments that define humans' responsibility to God, as opposed to those Commandments that implicate human conduct within civil society (such as the prohibition against murder). *See* BARRY, *supra* note 36, at 206.

67. *See supra* note 34 and accompanying text (describing the "Declaration of Dependence Upon God and His Holy Bible").

68. *See supra* notes 7-9 and accompanying text.

69. *See* Gerrett, *supra* note 32.

70. *See* Lon L. Fuller, *American Legal Philosophy at Mid-Century: A Review of Edwin W. Patterson's* Jurisprudence, Men and Ideas of the Law, 6 J. LEGAL EDUC. 457, 468 (1954) (describing the natural law "duty of obeying the positive law as founded on natural law itself and ... subject to exception only in extreme cases"); Kirk, *supra* note 62, at 1042-43 (arguing that it would be inconsistent with the "very existence of government" and lead to anarchy to allow each individual to freely disobey positive law); Note, *supra* note 51, at 480 n.93, 484.

71. *See* U.S. CONST. art. I, § 2, cl. 3 (distinguishing between "free" and "other" persons, changed by the Fourteenth Amendment); U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slave Clause, superseded by Thirteenth Amendment).

Thirteenth Amendment.[72] Radical abolitionists and some judges found this positive law unconscionable, but others felt bound to obey regardless of their individual moral views.[73]

This highlights the nature of civil disobedience, in which one disobeys what one regards as an unjust law while accepting the consequences of any resulting prosecution, as a means to communicate disagreement and to precipitate change. Slavery, however, may prove too much due to the clarity of the case ex post. Not every disagreement with positive law is presumptively legitimate and, particularly for issues in which there is widespread moral disagreement within society, sanctioning disobedience with positive law based on every individual's personal views is anarchistic.[74] Robert Cover adopts a more nuanced view in the case of discrete communities (such as the Amish and the Mennonites), whose alternative interpretations of law he asserted are entitled to legitimacy in a pluralistic society, no less presumptively valid than those of judges.[75] One could argue that natural law ranch advocates constitute such a community, whose internal normative worldview legitimizes their alternative legal interpretations. I do not read Cover, however, to negate the legal force of positive law and definitive interpretation and application by the courts in the face of such alternative legal views.

It makes sense that, during the profoundly religious medieval period, Catholic theologians and legal scholars would propose a theory of natural law rooted in absolute laws commanded by God. The Catholic Church was a significant political and religious force that

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72. *See* U.S. CONST. amend. XIII.

73. In *The Antelope*, Chief Justice John Marshall proclaimed, "[t]hat [slavery] is contrary to the law of nature will scarcely be denied," but held that one nation was not free to contravene the positive law of another to enforce that precept. *See* The Antelope, 23 U.S. (10 Wheat.) 66, 120-22 (1825). *But see* United States v. The La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (Story, J., sitting as Circuit Justice) (upholding federal government's claim to seized French slave-trading vessel because slavery "is founded in a violation of some of the first principles, which ought to govern nations. It is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice."). For the classic explication, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 101-05 (1984).

74. *See supra* note 16 (regarding the relative willingness of courts to consider a necessity defense in cases involving civil disobedience).

75. *See* Cover, *supra* note 6, at 50-53.

competed with the coexisting feudal order to govern society.[76] A religious philosophy that promoted absolute obedience, in a society with weak state control, helped to solidify the power of the Catholic Church.[77] Where a dominant institution held a monopoly in proclaiming God's higher law, there was less risk that multiplicity of interpretation would contribute to anarchy.[78] Through excommunication,[79] the Inquisition,[80] and other powers, the Church had direct mechanisms to enforce its view of natural law.

2. Natural Law in the Enlightenment

Enlightenment natural law theory is particularly relevant here because of its influence on the early American legal philosophy[81] upon which natural law ranch advocates rely.[82] During the Enlightenment in Europe and colonial America, religiously derived natural law evolved into a theory positing that moral principles that guide human laws could be derived from "right reason" (rational thought) based on fundamental principles of human nature.[83] Enlightenment

76. *See* Philip S. Gorski, *Historicizing the Secularization Debate: Church, State, and Society in Late Medieval and Early Modern Europe, Ca. 1300 to 1700*, 65 AM. SOC. REV. 138, 140 (2000) (noting the dominance of the Church in medieval society).

77. *See* John Witte, Jr., *Facts and Fiction About the History of the Separation of Church and State*, 48 J. CHURCH & ST. 15, 19 (2006).

78. *See id.*

79. *See, e.g.*, G.W. BERNARD, THE KING'S REFORMATION: HENRY VIII AND THE REMAKING OF THE ENGLISH CHURCH 34 (2005) (describing the potential for excommunication of King Henry VIII over his divorce from Anne Boleyn).

80. *See* E. VACANDARD, THE INQUISITION: A CRITICAL AND HISTORICAL STUDY OF THE COERCIVE POWER OF THE CHURCH 115-16, 138 (1908) (examining the Catholic Inquisition from the standpoint of morality, justice, and religion).

81. It is doubtful that there was a dominant legal philosophy in colonial America, as opposed to a wide range of influences from which the colonists drew and derived equally varying views. *See* ELY, *supra* note 62, at 48-49.

82. *See supra* notes 7-9, 18-19 and accompanying text.

83. *See* Arkes, *supra* note 28, at 1248 (rooting Enlightenment natural law in Kant's theory that all moral principles came from rational being); Heimbach, *supra* note 28, at 694-95 (explaining Grotius's view that natural law is the product of "autonomous, non-regenerated human reason," and explaining the role of Enlightenment philosophers, such as Hobbes and Rousseau, although claiming that the nonreligious nature of their work was responsible for the abuses of the French revolution); Helmholz, *supra* note 28, at 419-21 (tracing natural law roots in Europe from the twelfth through the nineteenth centuries); Kennedy, *supra* note 28, at 44-47 (explaining Enlightenment natural law's emphasis on "empiricism and rationalism"); Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1514 (2011) (identifying natural law as accessible to all humans through reason).

philosophers still viewed natural law as universal, because it was based on immutable characteristics of people and communities that predated organized society.[84] Therefore, natural law required no state involvement for its development or enforcement, leading to "prepolitical" rights and duties.[85] Most Enlightenment legal and political philosophers, however, retained a religious foundation for natural law.[86] That tradition may have inspired the political leaders of the American Revolution[87] to justify separation from England based on "unalienable rights" "endowed by their Creator."[88]

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84. Note, *supra* note 51, at 461.

85. *See* Richard A. Epstein, *How Spontaneous? How Regulated?: The Evolution of Property Rights Systems*, 100 IOWA L. REV. 2341, 2342 (2015); *see also* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 12 (1974); Note, *supra* note 51, at 461.

86. Those writers included Protestants such as Grotius, Vattel, and Pufendorf. *See* Heimbach, *supra* note 28, at 694 (contrasting Grotius's view that morality could be derived from human reason but full acceptance depended on belief in God with the Calvinist view that the only path to moral righteousness was through God); R. H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. CONST. L. 401, 407 (2007); Kirk, *supra* note 62, at 1037 (discussing the manner in which natural law was "[p]rotestantiz[ed]" by Grotius and others).

87. *See* Epstein, *supra* note 85, at 2346 (discussing Locke's theories of property); Heimbach, *supra* note 28, at 694-95 (discussing the influence of Hobbes and Rousseau); Helmholz, *supra* note 28, at 421 n.30 (quoting Blackstone); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) (linking the origins of a private realm to the "natural rights liberalism of Locke"); Kennedy, *supra* note 28, at 44-46 (discussing the influence of Locke and Montesquieu on Jefferson); O'Scannlain, *supra* note 83, at 1517 (noting Locke's heavy influence on Jefferson); Wright, *supra* note 62, at 473 (discussing Lockean natural laws).

88. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see* HANKS ET AL., *supra* note 55, at 479 (noting natural rights rhetoric dating to the Declaration of Independence); Arkes, *supra* note 28, at 1246 ("The object of the Constitution ... was 'to acquire a new security for the possession or the recovery of those rights' we already possess by nature." (quoting James Wilson, *Of the Natural Rights of Individuals*, *in* 2 THE WORKS OF JAMES WILSON 585, 585 (Robert Green McCloskey ed., 1967))); *id.* at 1255 ("[T]he anchoring proposition of the American Republic[ ] [is] 'all men are created equal.'" (quoting Abraham Lincoln, U.S. President, Gettysburg Address (Nov. 19, 1863))); Note, *supra* note 51, at 487-88 (discussing the "founding father approach" to natural law espoused by many Americans); *infra* Part I.B (discussing the Declaration of Independence). *But see* Alschuler, *supra* note 53, at 491 (identifying Blackstone as "the principal teacher of law to American lawyers of the revolutionary generation and the early republic"); George, *supra* note 53, at 2269, 2276 (discussing Jefferson's appeal to natural rights in the Declaration of Independence, and describing the founders' belief in natural law as embodied in English common law); Kirk, *supra* note 62, at 1039 (describing American political leaders at the time of the Constitutional Convention as Blackstone disciples); O'Scannlain, *supra* note 83, at 1514 ("[T]he belief that the Constitution embodies natural law principles 'was not even the majority view among those "framers" we would be likely to think of first.'" (quoting ELY, *supra* note 62, at 39)); *id.*

Enlightenment philosophy continued to suggest that any positive law inconsistent with natural law was illegitimate or void.[89] Notwithstanding the more egalitarian idea that natural law was accessible to anyone through human reason, however, this theory gave individuals no greater license to decide what constituted binding law.[90] Governments still dictated enforceable rules through positive law, with judicial, legislative, and other mechanisms that could conform positive law to natural law when necessary.[91] Enlightenment philosophers reinforced the principle that natural law required obedience to duly adopted positive law to guarantee that society functioned and to ensure harmonious relations.[92] Even in an extreme case—such as the American Revolution—when a society determined that existing positive law so violated "unalienable rights"[93] that a radical change of government was justified,[94] natural law demanded that it revolt through legal means.[95]

("[N]atural law and natural rights philosophies were not that broadly accepted [at the time of the Constitution]; in fact, they were quite controversial." (quoting John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 25 (1978))).

89. *See* Hemholz, *supra* note 86, at 420-21.

90. *See* WILLIAM BLACKSTONE, COMMENTARIES 1:120-41 (1765), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 388, 388 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[E]very man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable, than that wild and savage liberty which is sacrificed to obtain it.").

91. *See* Helmholz, *supra* note 86, at 402.

92. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 188-89 (Thomas I. Cook ed., 1947) (1689) (arguing that legitimate laws passed by the consent of the people command obedience); Steven Kautz, *Liberty, Justice, and the Rule of Law*, 11 YALE J.L. & HUMAN. 435, 443 (1999) (arguing that the Enlightenment philosophers recognized that obedience to legitimate positive law was necessary to obtain liberty).

93. THE DECLARATION OF INDEPENDENCE, *supra* note 88, para. 2.

94. *See* Fuller, *supra* note 70, at 468 (suggesting that the duty to obey positive law might be subject to exception in "extreme cases").

95. In the American Revolution, the Continental Congress was an official governmental body even if it did not have the sanction of the English government. *See* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 56 (1940) (describing the First Continental Congress as being comprised of "the ambassadors of twelve distinct nations"). Contrast the process that implemented the American Revolution from the mob rule that characterized the French Revolution. *See* DAN EDELSTEIN, THE TERROR OF NATURAL RIGHT: REPUBLICANISM, THE CULT OF NATURE, AND THE FRENCH REVOLUTION 20-21, 131-33 (2009) (describing the use of natural law and natural rights to justify the reign of terror during the French Revolution, and

Just as Catholic natural law reflected prevailing social, political, and other circumstances, Enlightenment natural law reflected the surrounding political and social milieu. Nation-states competed against monarchs who asserted their divine right to rule by fiat rather than by reason.[96] The argument that individuals could deduce principles of law and morality through reason supported the collective rights of people to self-govern.[97]

3. Natural Law in the Secular State

Beginning in the nineteenth century, much of Europe gradually abandoned natural law in favor of the secular systems of positive law reflected in civil codes and other sources.[98] Even in England, whose common law heritage gave rise to the natural law philosophies of Locke, Blackstone, and Coke,[99] utilitarian legal philosophers such as Austin and Bentham led a positive-law transition that is best reflected in modern times by the writings of H. L. A. Hart.[100]

Natural law in the American colonies, by contrast, initially retained a religious tenor given the dominance of Protestant society.[101] That philosophy became less tenable as the colonies

comparing the French and American revolutions in their treatment of dissidents).

96. *See* Horwitz, *supra* note 87, at 1423 (discussing the tension between the emergence of nation-states and notions of sovereignty in the sixteenth and seventeenth centuries, as well as the philosophy that natural rights can set limits on state power).

97. *See* BLACKSTONE, *supra* note 90 (asserting that absolute rights are "few and simple" but that people can derive secondary rights that are "far more numerous and more complicated" from those fundamental rights).

98. *See* Note, *supra* note 51, at 462.

99. *See supra* notes 87-90, 177.

100. *See* HART, *supra* note 62, at 268 (arguing that law was simply rules dictated by human politics with no necessary connection to morality); Hart, *Positivism and the Separation of Law and Morals*, *supra* note 62, at 599. Led by the scholarly writings of Justice Oliver Wendell Holmes, both theistic and Enlightenment versions of natural law similarly lost their hold in the United States by the first half of the twentieth century. *See* Horwitz, *supra* note 87, at 1426; *infra* Part I.C.

101. *See* SAMUEL ADAMS, THE RIGHTS OF THE COLONISTS (1772) (discussing religious tolerance for Protestants, but not Catholics, and describing the rights of the Colonists as Christians), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 90, at 394, 394-96; Bayne, *supra* note 53, at 217 ("In the year 1764, James Otis expressed the fact that all laws and government have 'an everlasting foundation in the unchangeable will of God,' ... [which was] expressive of the tradition of natural law thinking that so characterized the entire governmental philosophy of the United States from its conception." (quoting JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1764))); Kirk, *supra* note 62, at

adopted principles of religious tolerance,[102] expressed ultimately in the Establishment Clause of the First Amendment.[103] Along with the Free Exercise Clause of the First Amendment,[104] the Establishment Clause ensures religious liberty by preventing the political or legal dominance of any faith (or religion at all) in the United States. The First Amendment, however, simultaneously limits the degree to which religious text, philosophy, or any interpretation of religious texts, dictate constitutional interpretation or any other aspect of federal or state law.[105]

Thus, although religion influenced early American jurists,[106] the rhetoric and justification for natural law adopted a secular grounding. Even if they believed in *natural rights* endowed by a Creator, American *natural law*[107] proponents argued that natural law was based on universally accepted moral principles or legal maxims.[108] As students of Blackstone,[109] early American jurists believed that natural law principles could be derived from a few fundamental and commonly accepted natural rights of "prepolitical" people.[110] To be sure, religious natural law theories have continued in the United States through the influence of Catholic[111] and Evangelical[112] legal

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1038-39 (noting that most of the thirteen colonies adopted the Church of England as their official religion, that the natural law teachings of Anglican preachers were "imparted from American pulpits," and that most of the Framers of the Constitution were Anglicans).

102. *See* BARRY, *supra* note 36, at 389-90.

103. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion.").

104. *Id.* ("Congress shall make no law ... prohibiting the free exercise" of religion).

105. *See supra* notes 103-04.

106. *See* Helmholz, *supra* note 86, at 401 (asserting that contemporary American lawyers believed that principles of justice "were part of human nature, formed within [them] by God. These principles were common to all men everywhere, they were immutable, and they provided the necessary foundation of all human law.").

107. *See* Kirk, *supra* note 62, at 1040 (distinguishing between Enlightenment doctrines of natural rights and traditional doctrines of natural law).

108. *See* Arkes, *supra* note 28, at 1254-56. Hamilton used this logic ("the nature and reason of the thing") in *The Federalist Papers*. *See* THE FEDERALIST NO. 78, at 404, NO. 83, at 431, NO. 84, at 448 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

109. *See supra* note 87 and accompanying text.

110. *See supra* note 85 and accompanying text.

111. *See* John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 848 (1991) (tracing then-Senator Joe Biden's belief in natural law to his Catholic upbringing); Hensler, *supra* note 55; Note, *supra* note 51, at 473 (noting that natural law was relegated to Catholic law schools); O'Scannlain, *supra* note 83, at 1514 (citing a view of natural law as parochial and

scholars, but those ideas have disappeared from formal legal decisions.[113] Indeed, the most ardent legal positivists among the U.S. judiciary in recent years include conservatives such as Justice Scalia and Judge Bork, whose ideological views most likely align with advocates for natural law grounded in religion.[114]

The elimination of religion in natural law also prompted a shift in which branches of government should determine how natural law influences positive law. Judges in the religious natural law tradition were free to declare void any law enacted through legislative, executive, or even monarchial authority.[115] Once natural law is stripped of its theistic force, societies may adopt different governmental systems to decide which moral concepts should govern positive law. As explained below, that is what the Framers of the U.S. Constitution did in adopting a democratic republic.[116] Elected branches of government make policy determinations about positive law, for which they are accountable through the electoral process.[117] Judges are not free to invalidate that law based solely on their own notions of natural law or other sources of morality or policy, unless a statute violates constitutional requirements.[118] The federal and state constitutions have become the "higher law" for purposes of judicial review.[119]

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specifically Catholic).

112. *See, e.g.*, Heimbach, *supra* note 28, at 686 (discussing a resurgence of interest in natural law among evangelicals).

113. *See* Heimbach, *supra* note 28, at 696 (decrying the rejection of religiously based natural law in the twentieth century); Helmholz, *supra* note 86, at 402 (noting that natural law "lost its hold on the common assumptions of most lawyers" by the end of the nineteenth century); Kirk, *supra* note 62, at 1036 (citing the prevalence of judicial positivism since 1938); Note, *supra* note 51, at 461-62 (noting that natural law was "banished" from judicial opinions and legal education in the late nineteenth century); *infra* Part I.C.

114. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 208-11 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989).

115. *See* Helmholz, *supra* note 86, at 420-21; *see also* Witte, Jr., *supra* note 77, at 19 (describing papal power over the civil government of the Roman Empire).

116. *See infra* Part I.B.

117. *See* George, *supra* note 53, at 2282.

118. *See id.*

119. *See* THE FEDERALIST NO. 78, *supra* note 108, at 404 (Alexander Hamilton) (identifying a constitution as "a fundamental law" to which judges must be bound over all other sources of law); George, *supra* note 53, at 2282; O'Scannlain, *supra* note 83, at 1514.

This shift, however, has not eliminated the idea that some kind of "fundamental law" necessarily plays a role in the legal process.[120] Secular versions of natural law maintain that law cannot be separated from morality, but that morality need not be tied to religion.[121] For example, Lon Fuller forged a procedural theory of law as morality (which he referred to as "the internal morality of the law"[122]) in which the legitimacy of positive law depends on a series of moral precepts that legitimize positive law without dictating its substantive content.[123] Ronald Dworkin advocates that law derives its legitimacy from "integrity."[124] John Hart Ely, who would eliminate the positive law/natural law dichotomy from a terminological perspective, rejects the unconstrained use of extrinsic sources (or a judge's own view of morality) to reach constitutional decisions.[125] He believes it is appropriate, however, to interpret ambiguities and fill interstitial gaps in constitutional texts with extrinsic sources to ensure the integrity and inclusiveness of the political system and to legitimate the democratic process through which substantive judgments are made by elected officials.[126] Robert Cover goes further, arguing that there is room for diverse sets of normative structures ("nomos") discrete communities may embrace, leading to alternative—but equally valid—sets of legal interpretations.[127] Some writers advocate a more limited role for natural law as an interpretive tool rather than a binding rule of decision,[128] or to be used only

120. The classic modern defense of natural law in the face of H. L. A. Hart's ardent positivism, *see supra* note 62 and accompanying text, was Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 630-63 (1958), and later LON L. FULLER, THE MORALITY OF LAW 3-4 (rev. ed. 1969). Earlier, Fuller had distinguished between law based on state force and moral imperatives. *See* LON L. FULLER, THE LAW IN QUEST OF ITSELF 2-15 (1940); *see also* Fuller, *supra* note 70, at 462-63; Kirk, *supra* note 62, at 1045 (arguing that the private interpretation of natural law should not be used to settle conflicts, but that natural law should help form the judgments of lawmakers).

121. *See, e.g.*, Kennedy, *supra* note 28, at 39-40 (explaining that Fuller "still rejected the providential origins of natural law").

122. FULLER, THE MORALITY OF LAW, *supra* note 120, at 81.

123. *See id.* at 33-94 (identifying those precepts as rules that are transparent, prospective, understandable, consistent, attainable, and enforced fairly and evenhandedly).

124. *See* RONALD DWORKIN, LAW'S EMPIRE 191-92 (1986).

125. *See* ELY, *supra* note 62, at 87-88.

126. *See id.*

127. *See* Cover, *supra* note 6, at 6-9.

128. *See* O'Scannlain, *supra* note 83, at 1515, 1524-25 (arguing that natural law is useful in helping judges go beyond the constitutional text to understand its original meaning).

in extreme circumstances such as slavery, genocide, or other patent human rights violations.[129] This prompts the question, of course, of what constitutes a sufficiently "extreme" case to invoke natural law. Others advocate a return to a jurisprudence in which jurists can rely on natural law sources, some religious in origin,[130] to safeguard fundamental rights that predated the Constitution.[131]

These secular variations of natural law posited by U.S. legal scholars differ significantly in focus, but reflect a common theme. They seek to preserve the integrity of the processes of law and democracy through which elected branches of government make substantive policy decisions. They also help to ensure equality and therefore equal participation in those processes, without dictating the substance of those decisions by reference to moral guideposts extrinsic to the Constitution or other positive law.

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129. *See* Hensler, *supra* note 55, at 166 (advocating a limited role for natural law only when "absolutely essential to the human law's more limited goal"); Wright, *supra* note 62, at 486 (arguing that there must be cases, such as the legitimacy of slavery, where determinacy is clear and preferable). Some assert that absolute faith in the dominance of positive law was shaken by the horrors of fascism in World War II. *See* Note, *supra* note 51, at 463-64 (noting that Hitler meticulously observed the formalities of the legal process, came to power by constitutional means, and was elected by a plurality of the German people); *see also* Fuller, *supra* note 70, at 465 (noting that the Nazis "came to power through the calculated exploitation of legal forms"). That experience likely helps to explain the 1948 adoption of the Universal Declaration of Human Rights, which one could view as an international statement of positive law articulating those principles of human rights—or universally accepted moral principles—to which all people are entitled regardless of the particular political environment in which they reside. *See* G.A. Res. 217 (III) A, at 71, Universal Declaration of Human Rights (Dec. 10, 1948) (affirming the "equal and inalienable rights of all members of the human family").

130. *See, e.g.*, Hensler, *supra* note 55, at 153 (referring to a revival of natural law tradition for "at least the last two decades"); Kennedy, *supra* note 28, at 36, 39 (referring to a natural law revival). The source and legitimacy of natural law was also a significant issue during the confirmation hearing in the U.S. Senate for Supreme Court Justice Clarence Thomas, as well as the unsuccessful effort to confirm Judge Robert Bork. *See* Linda P. Campbell, *Thomas' Belief in "Higher Law" at Center Stage*, CHI. TRIB. (Aug. 18, 1991), http://articles.chicagotribune.com/1991-08-18/news/9103010246_1_natural-law-natural-law-positive-law [https://perma.cc/L495-S7FT]; Laurence H. Tribe, *Clarence Thomas and "Natural Law,"* N.Y. TIMES (July 15, 1991), http://www.nytimes.com/1991/07/15/opinion/clarence-thomas-and-natural-law.html [https://perma.cc/BE38-9VJK].

131. *See* Arkes, *supra* note 28, at 1254 ("The first generation of our jurists ... trace[d] their judgments back to first principles ... that were usually not mentioned in the text of the Constitution, because they were truths that had to be in place before one could even have a constitution or a regime of law."); *see also* Heimbach, *supra* note 28, at 685-86; Kennedy, *supra* note 28, at 33 (approving of Justice Thomas's implicit reliance on natural law).

Moreover, even under a secular understanding of natural law, judges interpret and enforce statutory law where it is ambiguous or has gaps, and decide cases under common law where no statutory law applies. In that sense, some scholars identify common law as a form of natural law.[132] Absent legislative or constitutional mandates, judges apply reason to determine what rules best reflect and promote shared community norms.[133] Similarly, the concept of equity, through which judges may relieve parties from strict requirements of law, necessarily relies on recognized norms of what is "fair" or "just."[134]

The ability of judges to use natural law to influence decisions not directly controlled by positive law,[135] however, again does not allow an individual to disobey positive law based on religious or other personal beliefs.[136] Although the Supreme Court has struck down positive law as a violation of an individual's right to free exercise of religion,[137] that required a judicial ruling. Disobedience is not justified simply because positive law contravenes an individual's personal interpretation of natural law on other issues of public policy,[138] such as the relationship between private property and public natural resources.[139] Moreover, it has only occurred when positive law has interfered directly with an individual's or a group's exercise of their First Amendment rights.[140]

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132. *See* Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 17-22 (1968) (explaining common law as a community of judges in shaping rules from natural principles of justice); George, *supra* note 53, at 2276 (placing English common law as a "positive embodiment of the natural law").

133. *See* Dworkin, *supra* note 132, at 23-28 (citing as example that one should not be allowed to profit from one's own dishonesty); *see also* Horwitz, *supra* note 87, at 1425 (citing the principle that "equity will not enforce unfair contracts").

134. *See* THE FEDERALIST No. 80, *supra* note 108, at 540 (Alexander Hamilton) (explaining role of equity to prevent absolute legal rules from generating "some undue and unconscionable advantage").

135. *See supra* notes 132-34 and accompanying text.

136. *See supra* notes 89-92 and accompanying text.

137. *See, e.g.*, Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) (invalidating city ordinance requiring individuals to obtain permit before distributing religious literature).

138. *See supra* note 70.

139. *Cf. supra* text accompanying notes 71-73.

140. *See* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 169 (2002) (striking down statute that required permit to engage in religious proselytizing, anonymous political speech, and the distribution of handbills); Thomas v. Collins, 323 U.S. 516, 518 (1945) (invalidating statute requiring a permit before speaking to union organi-

B. Natural Law in Formative U.S. Legal Documents

Some advocates for a resurgence of substantive natural law rely in part on the text of foundational U.S. legal documents and the American Revolution-era concept of divinely conveyed and, therefore, inalienable rights.[141] The diminishing role of theistic natural law in U.S. jurisprudence, however, began not with the positivist school of law advocated by jurists and legal scholars in the early twentieth century, as is sometimes claimed.[142] The shift from theocratic to democratic emphasis is evident in the American Republic's foundational legal texts.[143]

The Declaration of Independence contains the most famous Revolutionary-era reference to natural law. While attributing a divine source to natural rights, however, the Declaration also highlights the critical role of positive law:

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zation).

141. *See* Arkes, *supra* note 28, at 1246-47, 1254 (arguing that the Constitution's purpose "was the securing of ... 'natural rights,'" and to the extent natural law principles were not mentioned explicitly in the Constitution, it was "because they were the truths that had to be in place before one could even have a constitution or a regime of law" (first quoting THE FEDERALIST No. 84, at 578-79 (Alexander Hamilton) (Jacob E. Cook ed., 1961); then citing Edward J. Erbele, *The Right to Information Self-Determination,* 2001 UTAH L. REV. 965, 1008 n.240)); George, *supra* note 53, at 2282 (expressing the softer view that the "Constitution embodies our founders' belief in natural law and natural rights," as opposed to specific textual support); Kennedy, *supra* note 28, at 34 (defending Justice Clarence Thomas's jurisprudence based on his "connectedness to both the mind and spirit of the Framers of the Constitution"); O'Scannlain, *supra* note 83, at 1515-18 (arguing that natural law and natural rights were "woven into the fabric of the Constitution"); *see also* Helmholz, *supra* note 86, at 404-07 (comprehensively chronicling natural law principles in the writings of the constitutional Framers). The most extreme version of this belief, and one that one ordinarily would not think necessary to mention or refute in a scholarly law review article, is the belief that Jesus Christ was the author of the U.S. Constitution. *See* Shadee Ashtari, *Tom DeLay Claims God Wrote the Constitution*, HUFFINGTON POST (Feb. 21, 2014, 6:03 PM), http://www.huffingtonpost.com/2014/02/20/tom-delay-god-constitution_n_4826503.html [https://perma.cc/VZT6-HST8].

142. *See* Alschuler, *supra* note 53, at 497 (identifying Justice Holmes as the source of the "revolt against natural law" in the late nineteenth and early twentieth centuries).

143. *See* Kirk, *supra* note 62, at 1039 (arguing that even though American political leaders and jurists were Blackstone disciples, the Constitution was a "practical instrument of government" rather than a "natural law document"); O'Scannlain, *supra* note 83, at 1514 ("[T]he belief that the Constitution embodies natural law principles 'was not even the majority view among those "framers" we would be likely to think of first.'" (quoting ELY, *supra* note 62, at 39)).

> WHEN in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume *among the powers of the earth*, the separate and equal station to which *the laws of nature and of nature's God* entitle them, a *decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation.
>
> We hold these truths to be self-evident: that all men are created equal; that they are *endowed, by their Creator, with certain unalienable rights*; that among these are life, liberty, and the pursuit of happiness. That *to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed*.[144]

The italicized portions signal ambivalence about the role of natural law in the call for independence. By referencing "laws of nature and of nature's God" and "endowed by their Creator, with certain unalienable rights,"[145] the Declaration identifies deity as the source of the rights asserted by the colonists.[146] Some jurists and scholars cite these words as "Exhibit A" in their case for renewal of substantive natural law.[147] The phrases "powers of the earth"[148] and "decent respect to the opinions of mankind," however, reflect Enlightenment natural law doctrine that the people, through their established governments, dictate how they should be governed, and by whom.[149] The second paragraph clarifies that people establish institutions to "secure these rights" through powers derived "from

144. THE DECLARATION OF INDEPENDENCE, *supra* note 88, paras. 1-2 (emphasis added).

145. *Id.*

146. *See id.*

147. *See, e.g.*, Kennedy, *supra* note 28, at 50 (citing Clarence Thomas's view that "the Constitution should be interpreted in a manner consistent with the higher law principles made manifest in the Declaration of Independence"); O'Scannlain, *supra* note 83, at 1516-17.

148. THE DECLARATION OF INDEPENDENCE, *supra* note 88, para. 1.

149. *See supra* notes 106-10 and accompanying text. Stephen Greenblatt went even farther recently, arguing that Jefferson's invocation of "the pursuit of happiness" reflected an evolving agnosticism based on a Renaissance revival of the hedonistic theories advocated by the Roman poet Lucretius, which subsequently influenced Enlightenment philosophy. *See* STEPHEN GREENBLATT, THE SWERVE: HOW THE WORLD BECAME MODERN 262-63 (2011). It is not clear, however, how this theory can be reconciled with the Declaration's reference to God.

the consent of the governed."[150] That is also entirely consistent with the distinction between natural rights and natural law.[151]

The authors of the Declaration thus intended to break from existing understanding of natural law and establish a government, as later described by Lincoln, "of the people, by the people, for the people."[152] Being bound by English positive law, however, the authors needed to rely on authority other than English law to justify independence. The Declaration's reliance on French Enlightenment political philosophy served that function, as well as the accompanying political purpose of soliciting French financial and military assistance.[153]

Notably, once the Colonies declared independence, neither of the two most important formative U.S. legal documents that followed embraced natural law significantly.[154] The Articles of Confederation cite neither natural law nor the "laws of God" as the source of substantive rights or principles of government.[155] The Constitution, in turn, begins with a Preamble that reads even more clearly as positive law:

> *We, the people* of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity,

150. THE DECLARATION OF INDEPENDENCE, *supra* note 88, para. 2.

151. *See supra* notes 106-10 and accompanying text.

152. Abraham Lincoln, U.S. President, Gettysburg Address (Nov. 19, 1863), *in* THIS FIERY TRIAL 183-84 (William E. Gienapp ed., 2002).

153. *See* Kirk, *supra* note 62, at 1040 (asserting that, as Francophiles, Jefferson and others adopted the rhetoric of Montesquieu and other French political philosophers to curry favor with the French political establishment).

154. Some proponents of religiously grounded natural law minimize the significance of this change by asserting that the Declaration remains a "preamble to the Preamble to the Constitution." *See* Kirk, *supra* note 62, at 1040 (describing William Bently Hall's view); *see also supra* note 147. *But see* Kirk, *supra* note 62, at 1040 (rejecting Hall's view that the Declaration is a "preamble to the Constitution's Preamble" because "the Declaration is not part and parcel of the Constitution").

155. The only reference to deity, or other source of natural law, comes in the last substantive paragraph of the Articles. That provision, however, invokes God not as a source of law, but as inspiration to Colonial legislatures to ratify the document: "AND WHEREAS it has pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union." ARTICLES OF CONFEDERATION OF 1781, art. XIII, para. 2.

> *do ordain and establish* this Constitution for the United States of America.[156]

The fact that the Preamble declares that the "people of the United States" sought to adopt a Constitution to "secure the *blessings* of liberty,"[157] does suggest that the framers drafted the Constitution as positive law to protect natural rights of people. This is consistent with the focus of the Founders on natural rights, and "blessings" could reflect a belief in a religious origin of those rights.[158]

Beyond the Preamble, however, nothing in the text of the Constitution, including the Bill of Rights, invokes natural law or a theistic origin to the document.[159] This silence is consistent with the Enlightenment view that positive law is the means by which society interprets, implements, and enforces natural law.[160]

Other provisions, although traditionally interpreted for other purposes, reinforce the dominance of positive law in the constitutional scheme. The Supremacy Clause is primarily an instrument of federalism,[161] but also reaffirms the positive law authority of the

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156. U.S. CONST. pmbl. (emphasis added).

157. *Id.* (emphasis added).

158. *See* Douglas S. Broyles, *Have Justices Stevens and Kennedy Forged a New Doctrine of Substantive Due Process? An Examination of* McDonald v. City of Chicago *and* United States v. Windsor, 1 TEX. A&M L. REV. 129, 155 (2013) (identifying pronouncements by Jefferson, Adams, and Madison about the religious origins of the rights the American Revolution sought to protect). Broyles quotes Alexander Hamilton in his debate with Samuel Seabury: "[N]atural liberty is a gift of the beneficent Creator.... *Civil liberty is only natural liberty, modified and secured by the sanctions of civil society*." *Id.* (quoting ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *reprinted in* 1 THE WORKS OF ALEXANDER HAMILTON IN TWELVE VOLUMES 53, 87 (Henry Cabot Lodge ed., 1904)). Hamilton also said,

> The principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute rights* of individuals.

Id. at 155 (quoting HAMILTON, *supra*, at 63-64).

159. The introduction to the inscription uses the standard dating reference of the time "in the year of our Lord one thousand seven hundred and eighty-seven," but otherwise the document lacks any reference to deity. U.S. CONST. inscription.

160. *See supra* note 91 and accompanying text.

161. *See* U.S. CONST. art. VI, cl. 2; THE FEDERALIST NO. 78, *supra* note 108, at 403-05 (Alexander Hamilton); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 233-237 (2000) (suggesting that the only source of law through which judges may invalidate legislation is the Constitution).

lawmaking branches of the federal government. Article VI, clause 3 of the Constitution parallels the Establishment Clause in prohibiting any requirement that a judge or other federal official be a member of any prescribed religion; but it also confirms that the law to which those officers are "bound by oath or affirmation" is the Constitution.[162] The "necessary and proper" clause, in addition to ensuring that Congress has legislative authority to effectuate other powers, is an affirmative recognition of the positive law authority of Congress within those areas of law granted to the federal government.[163] That authority was reinforced in the implementing provisions of the post-Civil War amendments.[164]

Even the Bill of Rights, which enumerates some "unalienable rights" proclaimed in the Declaration,[165] includes no express reference to natural law. The only amendment in the original ten that possibly invokes natural law—and then only by inference—is the Ninth, by reference to rights not otherwise addressed in the Constitution.[166] Although making no explicit reference to natural law, that provision has led to modern debates about the legal source and content of those rights.[167]

C. Natural Law in U.S. Jurisprudence

Notwithstanding the affirmation of positive law by "we the people," natural law continued to influence U.S. jurisprudence long after ratification of the Constitution.[168] The two concepts were not presumptively inconsistent, especially given the constitutional

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162. *See* U.S. CONST. art. VI, cl. 3.

163. *See* U.S. CONST. art. I, § 8, cl. 8; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 353 (1819) (upholding congressional power to establish the Bank of the United States as necessary and proper to effectuate express powers granted in the Constitution).

164. *See* U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2 (each authorizing Congress to enforce the rights guaranteed by those amendments "by appropriate legislation").

165. *See supra* note 144 and accompanying text.

166. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

167. *See infra* Part I.C.

168. *See generally* Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 625-51 (1916) (collecting and analyzing federal and state cases); Bayne, *supra* note 53 (collecting and analyzing U.S. Supreme Court cases); Note, *supra* note 51, at 494-511 (analyzing cases in various areas of law).

vision of a federal government with enumerated powers[169] and a federal judiciary with limited jurisdiction.[170] States were free to allocate lawmaking authority in any manner consistent with the Constitution.[171] This allowed state judges to develop nonconstitutional and nonstatutory law based on precedent and judgment given new circumstances. In the context of public resources, for example, courts modified the natural flow doctrine of riparian rights into a "reasonable use" approach that supported more intensive water use,[172] replaced riparian rights with prior appropriation in arid western states,[173] and expanded the public trust doctrine geographically[174] and substantively.[175]

That common law tradition, however, did not dictate the sources of law to decide new cases. Under the natural law philosophy that prevailed into the early twentieth century, judges believed in universal principles from which they could deduce the "right" or "true" rule of law to apply in particular cases.[176] Early American lawyers were schooled in this method of legal analysis through the writings of Blackstone, reinforced by American jurists such as Kent and Story.[177] Thus, nineteenth-century state courts frequently cited

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169. *See* Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) (stating that the federal government has no powers except those expressly conferred in the text of the Constitution, or "properly implied therefrom").

170. *See* U.S. CONST. art. III.

171. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

172. *See* ADLER ET AL., *supra* note 49, at 46-47; Joseph W. Dellapenna, *The Evolution of Riparianism in the United States*, 95 MARQ. L. REV. 53, 81 (2011) (noting that even early American riparian rights cases did not apply natural flow doctrine absolutely).

173. *See* Irwin v. Phillips, 5 Cal. 140, 145 (1855); Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882); Epstein, *supra* note 85, at 2357; *see also infra* Part II.A.

174. *See* Carson v. Blazer, 2 Binn. 475, 476-77 (Pa. 1810) (holding that English common law rule limiting navigable rivers to those subject to the ebb and flow of the tide was not appropriate to vastly different geography of Pennsylvania, with large, navigable inland rivers such as the Susquehanna, Allegheny, Ohio, and Delaware).

175. *See* Nat'l Audubon Soc'y v. Superior Court of Alpine Cty., 658 P.2d 709, 712 (Cal. 1983) (holding that public trust includes ecological values as well as traditional trust purposes of commerce, navigation, and fisheries).

176. *See* Helmholz, *supra* note 86, at 402.

177. *See* Alschuler, *supra* note 53, at 491; Bayne, *supra* note 53, at 218; Helmholz, *supra* note 86, at 401-02; Kirk, *supra* note 62, at 1039; *see also* Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 340-45 (Or. 2001) (tracing natural law in the United States to writings of Coke, Blackstone, Locke, and Kent, among others).

natural law to support their holdings.[178] Federal judges remained free in diversity cases to apply "universal" law to state cases rather than abiding by state precedent.[179] Analysts disagree, however, about the extent to which natural law was the principal authority for a holding or simply reinforced or explained the justness of positive law.[180]

To some degree, when judges reach common law decisions, whether they use secular natural law in their reasoning is semantic.[181] In his famous proclamation of legal realism, Justice Holmes opined that "[t]he life of the law has not been logic; it has been experience."[182] But even more realistically, common law judges determine whether existing precedent should apply, and if so how, based on a *combination* of reason and experience, tempered by what is fair or just under the circumstances.[183] The same is true when existing precedent offers insufficient guidance, must be modified to fit new

178. *See, e.g.*, Billings v. Hall, 7 Cal. 1, 11 (1857) (noting that natural law was "an eternal rule to all men, binding upon legislatures as well as others"); Commercial Bank of Natchez v. Chambers, 16 Miss. 9, 57 (1847) (describing liberty and property as "fundamental," "sacred" rights (quoting Judge Story)); Arnold v. Mundy, 6 N.J.L. 1, 76 (1821) (grounding public trust ownership of common resources in "the law of nature, which is the only true foundation of all social rights," in addition to the civil law of Europe and the common law of England); Fisher v. Patterson, 14 Ohio 418, 426 (1846) (referring to the "sacred right" to which everyone was entitled); *In re* Goodell, 39 Wis. 232, 245 (1875) (declaring that admittance of women to the state bar was "treason against" the order of nature).

179. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842) (interpreting the Rules of Decision Act as requiring federal judges to abide only by state statutory law in diversity cases, but not decisions of state courts, and holding that the law regarding negotiable instruments was "not the law of a single country only, but of the commercial world"), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

180. *See* Helmholz, *supra* note 86, at 409 ("[E]arly citation of natural law [was] 'not much more than literary garniture' in John Marshall's opinions." (quoting Felix Frankfurter, *John Marshall and the Judicial Function,* 69 HARV. L. REV. 217, 225 (1955))); *id.* at 416 ("[T]he law of nature normally played a subsidiary role in the American cases.... [I]t was cited to support other sources of law ... rather than to oppose ... them.").

181. *See Smothers*, 23 P.3d at 356 (finding that "absolute rights" are those recognized by the common law as derived "from nature or reason rather than solely from membership in civil society").

182. Oliver Wendell Holmes, *Early Forms of Liability*, *in* THE COMMON LAW 3, 3 (Mark DeWolfe Hawe ed.,1963).

183. *See* Note, *supra* note 51, at 494 ("The principles, standards, and precepts of Natural Law are continually [applied] by courts ... to the ever-varying circumstances of life.... They are part of man's nature and cannot be separated from his life." (quoting Robert Wilkin, *Status of Natural Law in American Jurisprudence*, 2 U. NOTRE DAME NAT. L. INST. PROC. 125, 147 (1948), *reprinted in* 24 NOTRE DAME LAW. 343, 361 (1949))).

circumstances, or when judges invoke equity to temper an inappropriately harsh result. Judges make such choices based on an understanding of human nature and societal norms or moral principles frequently asserted as natural law.

Judicial review of legislation, however, which Roscoe Pound referred to as the American version of natural law,[184] was more significant because of its potential to substitute the moral judgment of individual judges for policy decisions reached by an elected legislature. In *Calder v. Bull*,[185] Justice Iredell prevailed in the view that the Court could invalidate an ex post facto law on constitutional grounds but not, as Justice Chase urged, because the statute was "contrary to the *great first principles* of the social compact."[186] In *Marbury v. Madison*,[187] Chief Justice John Marshall wrote: "It is emphatically the province and duty of the judicial department to say what the law is."[188] That pronouncement, however, referred to laws that violated the Constitution, not a judge's individual view of natural law.[189]

The Supreme Court renewed its focus on natural law during the latter part of the nineteenth century and in the early twentieth century, during a pivotal period in the development of prior appropriation and other natural resources law.[190] In substantive due process opinions by Justices Field, Harlan, Brewer, and Sutherland,[191] however, it did so in ways that challenged the boundaries of natural law and jeopardized principles of separation of powers, most notably in a series of cases culminating in *Lochner v. New York*.[192]

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184. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 36-37 (Transaction Publishers ed., 1999); Note, *supra* note 51, at 497.

185. 3 U.S. (3 Dall.) 386 (1798).

186. *Compare id.* at 388 (opinion written by Justice Chase), *with id.* at 398-99 (Iredell, J., concurring in part and dissenting in part) (rejecting the idea that courts can invalidate legislation "merely because it is, in their judgment, contrary to the principles of natural justice").

187. 5 U.S. (1 Cranch) 137 (1803).

188. *Id.* at 177.

189. *See id.* at 178.

190. *See infra* Part II.A (regarding the influence of natural law on prior appropriation).

191. *See* Bayne, *supra* note 53, at 228-33, 235-36.

192. 198 U.S. 45, 57, 64-65 (1905) (invalidating state labor law setting maximum hours), *overturned by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); *see also* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 83, 86-87 (1872) (Field, J., dissenting) (arguing that the plaintiffs' position "has some support in the fundamental law of the country"); *id.* at 111-24 (Bradley, J., dissenting) (arguing that the right to choose a profession is both a protected

Based on alleged violations of economic liberty, such as freedom of contract, those decisions invalidated regulatory statutes adopted by federal and state legislatures.[193] The *Lochner*-era Court sought to constitutionalize its holdings by arguing that economic freedom was "part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[194] Dissenting jurists[195] and legal scholars[196] critiqued that practice as substituting the Court's policy preferences for those of elected legislators.

Federal judicial reliance on natural law persisted until the New Deal. In *Erie Railroad Co. v. Tompkins*,[197] the Court ended the ability of federal judges to decide diversity cases on grounds other than state statutory or judicial precedent.[198] Although also justified on statutory[199] and constitutional[200] grounds, Justice Brandeis pronounced the death of natural law as a source for federal courts to decide state common law:

> The doctrine rests upon the assumption that there is a "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what

liberty interest and property right); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139-41 (1872) (Bradley, J., concurring) (arguing that women should not be admitted to law practice due to "natural" differences between the sexes as well as "divine ordinance" and that "[t]his is the law of the Creator").

193. *See* David M. Driesen, *Regulatory Reform: The New Lochnerism?*, 36 ENVTL. L. 603, 606, 613 (2006) (arguing that modern regulatory reformers share with the *Lochner* court a reliance on "economic theory with natural law origins" and that freedom of contract was part of the liberty interest endowed by the Creator); Horwitz, *supra* note 87, at 1426 ("The hostility to statutes expressed by nineteenth-century judges and legal thinkers reflected the view that state regulation of private relations was a dangerous and unnatural public intrusion into a system based on private rights.").

194. *Lochner*, 198 U.S. at 53.

195. *See id.* at 74-76 (Holmes, J., dissenting) (objecting to use of the Fourteenth Amendment to substitute the Court's economic policy preference for that of the legislature); *see also* Tyson & Brother v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting) (arguing that state legislative policy should not be disturbed absent violation of federal or state constitutions).

196. *See supra* Part I.A.3.

197. 304 U.S. 64 (1938).

198. *See id.* at 78.

199. *See id.* at 71-73 (holding that the Rules of Decision Act requires federal judges in diversity cases to apply all state law, not only statutory law).

200. *See id.* at 78-80 (finding that a different construction would constitute an unconstitutional assumption of state lawmaking power by federal courts).

> the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law."[201]

Erie, however, applies only to federal judicial decisions in areas of law reserved to the states under the Tenth Amendment.[202] Under the Supremacy Clause, state positive law cannot override federal law with respect to powers delegated to the federal government.[203] What, then, suggests that natural law has no legitimate role in issues of constitutional interpretation and other federal law, including the use of federal lands?

Since the New Deal, most courts[204] and many legal scholars,[205] including conservative jurists,[206] have asserted that natural law has been supplanted by legal positivism. Federal courts may invalidate legislation only on constitutional grounds,[207] and the Court rejected the idea that natural law principles of economic liberty supported

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201. *Id.* at 79 (citing Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). Justice Brandeis cited an earlier dissent by Justice Holmes:

> [L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.

Id. (quoting *Black & White Taxicab*, 276 U.S. at 533-34 (Holmes, J., dissenting)).

202. *See* U.S. CONST. amend. X; *Erie*, 304 U.S. at 71-73.

203. U.S. CONST. art. VI, cl. 2.

204. *See, e.g.*, Attar v. Attar, 181 N.Y.S.2d 265, 267 (N.Y. Sup. Ct. 1958) (holding that the role of a judge is not to determine when natural law is supreme over positive law, but to adhere to and enforce positive law); Indus. Tr. Co. v. Pendleton, 40 A.2d 849, 851 (R.I. 1945) (explaining that natural law rights are protected and enforced by positive law).

205. *See, e.g.*, Helmholz, *supra* note 86, at 402 (noting that by the end of the nineteenth century, "natural law lost its hold on the common assumptions of most lawyers"); O'Scannlain, *supra* note 83, at 1514; Note, *supra* note 51, at 461-62 (claiming that natural law was banished "first from our law schools and then from the language of court opinions"); *see also* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 922-24 (2013) (providing a typology of sources of law before *Erie* and critiquing the *Erie* decision).

206. *See supra* note 114 and accompanying text..

207. *See* George, *supra* note 53, at 2282 (arguing that judges lack authority to "go beyond the text, structure, logic, and original understanding of the Constitution to invalidate legislation that, in the opinion of judges, is contrary to natural justice" and that the exercise of such authority usurps legislative power); Helmholz, *supra* note 28, at 427-28; Wright, *supra* note 62, at 464 (arguing that, in most cases, natural law theories are too indeterminate to control constitutional law outcomes).

constitutionally protected rights absent a clear linkage to the text of the Constitution.[208]

The second half of the twentieth century and the early part of the twenty-first century arguably saw a return of natural law reasoning, but for different purposes. Some commentators argue that, after the horrors of World War II, a U.S. Supreme Court that had become reluctant to impute economic liberty into the Fourteenth Amendment[209] became more aggressive in striking down legislation in the realm of civil rights.[210] Cases such as *Brown v. Board of Education*,[211] however, were rooted in constitutional text and principles,[212] or in "the text, structure, logic, and original understanding of the Constitution."[213] To avoid leaving substantive due process jurisprudence to the "policy preferences of the Members of this [Supreme] Court," and because "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended," the Supreme Court has struggled to articulate principles to guide this inquiry without embracing the term "natural law."[214]

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208. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391, 400 (1937) (upholding minimum wage law for women). As Chief Justice Hughes wrote: "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty." *Id.* at 391.

209. *See* Note, *State Views on Economic Due Process: 1937-1953*, 53 COLUM. L. REV. 827, 827-31 (1953) (tracing the rise and decline of the Supreme Court's recognition of economic liberty as a protected Fourteenth Amendment right).

210. *See* Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 904-05 (2016) (discussing the post-World War II judicial shift from using the Fourteenth Amendment to address economic liberty to civil rights and liberties); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1632-37 (2001); Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 838 (1993) (discussing the success of procedural reforms in opening the courts to civil rights claims); Note, supra note 51, at 499.

211. 347 U.S. 483 (1954).

212. *See id.* at 495 (grounding decision in the Equal Protection Clause of the Fourteenth Amendment); *see also* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (rooting challenge to D.C. segregated schools in the Due Process Clause of the Fifth Amendment).

213. George, *supra* note 53, at 2282.

214. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (referring to "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'" (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977))); *see* Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring) (invoking "those canons of decency and fairness which express the notions of justice of English-speaking peoples"); Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.) (speaking of "a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'"

The tension between natural law and constitutional law resurfaced in what Professor George refers to as the "*Griswold* problem,"[215] regarding the scope of residual rights protected by the Ninth Amendment. Although the subject of ongoing dispute, some argue that natural law forms a key basis for the constitutional right to privacy announced by the Supreme Court in *Griswold v. Connecticut*,[216] and a series of other liberty interests recognized by the Court in the wake of *Griswold*.[217] In the diverse opinions in *Griswold* itself,[218] the Justices debated the extent to which the liberty interests protected in *Griswold* were manifestations of natural law,[219] or were rooted in existing rights, or "penumbras"[220] of those rights in the Constitution. That debate expanded as the Court reviewed the constitutionality of state laws banning homosexual relations

(quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)) and rights "implicit in the concept of ordered liberty").

215. *See* George, *supra* note 53, at 2270.

216. 381 U.S. 479, 485 (1965).

217. *See id.* at 480, 485 (holding unconstitutional a Connecticut law prohibiting the use of contraceptives, even by married couples in the privacy of their own bedrooms, and medical services prescribing and informing patients on the use of contraceptives); *see also* Carey v. Population Servs., Int'l, 431 U.S. 678, 681-82 (1977) (extending *Griswold* to persons under sixteen years of age); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (extending *Griswold* to unmarried persons); HANKS ET AL., *supra* note 55, at 477-78 ; Harold R. DeMoss Jr. & Michael Coblenz, *An Unenumerated Right: Two Views on the Right of Privacy*, 40 TEX. TECH L. REV. 249, 252 (2008).

218. *Compare Griswold*, 381 U.S. at 484-86 (recognizing fundamental right to privacy that emanates from the principles in the Bill of Rights), *with id.* at 486-89 (Goldberg, J., concurring) (supporting the decision based on "fundamental" rights protected by the Ninth Amendment even without express mention in constitutional text), *and id.* at 499-502 (Harlan, J., concurring) (suggesting that the statute violated basic values "implicit in the concept of ordered liberty" protected by the Fourteenth Amendment (quoting *Palko*, 302 U.S. at 325)); *and id.* at 507, 527 (Black, J., dissenting) (Stewart, J., dissenting) (accusing majority of a return to natural law principles in which Justices were free to invalidate state laws based on personal beliefs and preferences).

219. *See* Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 50-51 (1992) (arguing that the one purpose of the Ninth Amendment, in addition to constraining federal power, provides a judicially enforceable source of natural rights).

220. Although the primary definition of "penumbra" is "a space of partial illumination (as in an eclipse) between the perfect shadow on all sides and the full light," an alternate definition is "a body of rights held to be guaranteed by implication in a civil constitution." *Penumbra*, MERRIAM-WEBSTER (2018) https://www.merriam-webster.com/dictionary/penumbra [https://perma.cc/5GJF-WEE9].

between consenting adults,[221] statutes banning abortion,[222] statutes restricting biracial marriage[223] and same-sex marriage,[224] statutes prohibiting assisted suicide,[225] and others.[226] In parallel with the Fourteenth Amendment debate, scholars continue to dispute whether the Ninth Amendment is an independent source of rights, and whether those rights can be identified by reference to natural law.[227] Others advocate a return to a jurisprudence in which jurists can rely on natural law sources, some religious in origin,[228] to safeguard fundamental rights that predated the Constitution.[229]

D. Natural Law Principles Relevant to Prior Appropriation

Based on this brief review of natural law, three principles are relevant to this analysis. First, natural law has never been a fixed concept. It has shifted as relevant to time, place, and circumstance, from its modern roots in medieval Europe, to its transformation during the Enlightenment, to its modification in the secular state.[230] Thus, to the extent that natural law is relevant to debates over ownership and use of public natural resources, it must be analyzed

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221. *See* Lawrence v. Texas, 539 U.S. 558, 562, 565-66 (2003).

222. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

223. *See* Loving v. Virginia, 388 U.S. 1, 2 (1967).

224. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

225. *See* Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997).

226. *See* Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (recognizing the right to procreate as one of the most fundamental rights of mankind); Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923) (recognizing parents' fundamental right to raise children).

227. *See* James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 FORDHAM L. REV. 2285, 2291 (2001) (critiquing George's analysis of the issue and arguing that natural law continues to provide "aspirational principles" to guide constitutional interpretation); Massey, *supra* note 219, at 49-50 (arguing that the Ninth Amendment is a source of unenumerated rights and that those rights can be informed by natural law).

228. *See* Hensler, *supra* note 55, at 153 (referring to a revival of natural law tradition for "at least the last two decades"); Kennedy, *supra* note 28, at 36, 39 (referring to a "natural law revival").

229. *See* Arkes, *supra* note 28, at 1254 (arguing that those sources "were usually not mentioned in the text of the Constitution, because they were truths that had to be in place before one could even have a constitution or a regime of law"); *see also* Heimbach, *supra* note 28, at 685; Kennedy, *supra* note 28, at 33 (approving of Justice Thomas's implicit reliance on natural law).

230. *See supra* Part I.A.

and applied in our current political and social context, not solely through the lens of a past era.

Second, a basic tenet of natural law is that individuals must respect and obey the positive law of the society in which they live, because that is the foundation on which all civil society is based.[231] Even the most ardent natural law advocates have accepted that positive law is the means through which governments effectuate and enforce rules for an orderly society, whether or not the substance of those rules is grounded in natural law.[232] Even those who advocate for changes in positive law because they violate natural law (including basic human rights) must do so through lawful means,[233] or when choosing civil disobedience as their method, must accept potential legal consequences as the price of their chosen tactic.[234]

Third, the Founders omitted any reference to a religiously grounded natural law in the text of the U.S. Constitution.[235] Indeed, through both the Establishment Clause of the First Amendment and the Oath or Affirmation Clause in Article VI, they prohibited the use of religion in adopting or interpreting positive law.[236] That left the federal and state constitutions as the exclusive source of judicial review of duly adopted legislation,[237] although it left open the possibility that judges might rely on principles associated with natural law in other contexts.[238] Those may include common law matters or other cases not directly addressed by legislation, cases that require judges to interpret ambiguities or to fill gaps in legislation or constitutional provisions, or cases in which equitable remedies may be appropriate even in the face of legislation or other binding positive law.[239] Scholars and jurists continue to debate the

231. *See supra* notes 70, 92 and accompanying text.

232. *See supra* note 73 and accompanying text.

233. *See supra* notes 93-95 and accompanying text.

234. *See* John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 119 (2007) ("One characteristic of civil disobedience is the recognition by its practitioner that he must face the legal consequences of his offense."); Ledewitz, *supra* note 5, at 97 n.144 (citing civil disobedience cases).

235. *See supra* note 159 and accompanying text.

236. *See supra* note 162 and accompanying text.

237. *See supra* note 119 and accompanying text.

238. *See supra* notes 132-34 and accompanying text.

239. *See supra* notes 132-34 and accompanying text.

precise manner and degree to which that interpretive flexibility is legitimate or appropriate.

II. PRIOR APPROPRIATION AND NATURAL LAW

A. Defining the Problem

1. Natural Law and Prior Appropriation in Water Law

The prior appropriation doctrine of western water law, in which priority of right is assigned in the temporal order in which users divert and put water to beneficial use,[240] evolved in a period when natural law influenced U.S. judicial philosophy.[241] Prior appropriation reflected classic common law processes in which courts recognized that new circumstances justified different legal rules.[242] The doctrine, however, was rooted in natural law principles regarding private property.

In *Irwin v. Phillips*,[243] the seminal California case on prior appropriation, new downstream miners asserted, against owners of a canal used by existing miners, the right to enjoy water in its free-flowing natural channel under the common law of riparian rights.[244] The downstream claimants were not riparian landowners; they were squatters on the public domain, hence trespassers.[245] They had no valid claim to riparian rights, and the Court could have dismissed the case summarily based on prevailing common law.[246] Instead, the Court reached the same result, upholding the canal owners' diversion rights,[247] through two related concepts.

First, the Court affirmed that the "right" of miners to prospect for gold on public land was recognized under the *custom* of the region absent action by the federal government—which owned the public

240. *See* ADLER ET AL., *supra* note 49, at 121-34.

241. *See* Eric T. Freyfogle, Lux v. Haggin *and the Common Law Burdens of Modern Water Law*, 57 U. COLO. L. REV. 485, 522 (1986).

242. *See id.* at 521-22.

243. 5 Cal. 140 (1855).

244. *See id.* at 145.

245. *See id.*

246. *See id.*

247. *See id.* at 147.

domain[248]—to prevent them from doing so.[249] The opinion did not specify the source of this "right," but noted that both parties were equally situated in their status as users of public lands.[250] The right cannot have been rooted in positive property law, under which the miners were trespassers.[251] The natural law rationale for allowing squatting on public lands, however, arguably stemmed from John Locke's "homestead" principle. Under Locke's theory, individuals have a natural right to acquire property by combining their labor with unassigned resources, so long as enough remains in quantity and quality for others to enjoy similar rights.[252] One possible application of this principle was that the federal government, in "owning" public resources, held them for the benefit of private individuals for later appropriation, and not as a proprietor.[253]

Second, the Court extended this natural right of appropriation to water as well as minerals:

> Courts are bound to take notice of the political and social condition of the country .... In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the

248. Unreserved federal lands were referred to as the "public domain" until the 1930s, when President Franklin Roosevelt withdrew them from entry following passage of the Taylor Grazing Act. *See Public Rangeland Management I*, *supra* note 24, at 536, 541.

249. *See Irwin*, 5 Cal. at 146 ("They had the right to mine where they pleased throughout an extensive region."). All parties admitted that

> the mining claims in controversy, and the lands through which the stream runs, and through which the canal passes, are a part of the public domain, to which there is no claim of private proprietorship, and that the miners have the right to dig for gold on the public lands was settled by this Court in the case of Hicks *et al*. v. Bell *et al.*, 3 Cal., 219.

Id. at 145.

250. *See id.*

251. *See id.*

252. *See* LOCKE, *supra* note 92, at 134 ("Whatsoever then he removes out of the state that nature hath provided ... he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*. It being by him removed from the common state nature hath placed it in, it hath by this *labour* something annexed to it that excludes the common right of other men. For this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others." (emphasis added)).

253. *But see* Hicks v. Bell, 3 Cal. 219, 224, 227 (1853) (holding the state owned gold and silver just as the British Crown did, and that the federal government held lands in the same status as private landowners, not in a sovereign capacity).

> State governments, and ... a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are ... many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res judicata* .... So fully recognized have become these rights, that without any specific legislation conferring, or confirming them, they are alluded to and spoken of in various acts of the Legislature in the same manner as if they were rights which had been vested by the most distinct will of the law makers.[254]

The court thus recognized a "right" to appropriate public resources, based on local custom and practice and justified by the "political and social condition of the country," without any prior positive legal authority.[255]

The Colorado Supreme Court took a similar approach[256] in *Coffin v. Left Hand Ditch*,[257] a dispute between a prior appropriator and a subsequent, bona fide riparian landowner.[258] Positive law in the Colorado Territory when the dispute arose[259] appeared to support riparian rights,[260] although the Court unconvincingly refuted that

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254. *Irwin*, 5 Cal. at 146.

255. *Id.*

256. The law of prior appropriation in California and Colorado would later diverge, with Colorado maintaining a "pure" system in which riparian rights were no longer recognized for purposes of water use and allocation, and California retaining some aspects of both doctrines. *See* Lux v. Haggin, 4 P. 919, 928-29 (Cal. 1886); Stephen H. Leonhardt & Jessica J. Spuhler, *The Public Trust Doctrine: What It Is, Where It Came from, and Why Colorado Does Not (and Should Not) Have One*, 16 U. DENV. WATER L. REV. 47, 75 (2012).

257. 6 Colo. 443 (1882).

258. *Id.* at 444, 447-49.

259. By the time the case reached the Colorado Supreme Court, Colorado had become a state and adopted prior appropriation in its constitution. COLO. CONST. art. XVI, § 5.

260. As reported by the *Coffin* Court, one portion of the applicable territorial statutes provided:

> All persons who claim, own or hold a possessory right or title to any land or parcel of land ... when those claims are on the bank, margin or neighborhood of any stream of water, creek or river, shall be entitled to the use of the water ... for the purposes of irrigation, and making said claims available to the full extent

implication.[261] Instead, the Court held that the prior appropriation doctrine applied in Colorado, prior to and notwithstanding existing positive law, as a fundamental right necessitated by the arid conditions in the region:

> The right to water in this country, by priority of appropriation thereof, we think it is, *and has always been*, the duty of the national and state governments to protect. *The right itself*, and the obligation to protect it, *existed prior to legislation on the subject* of irrigation.
>
> ....
>
> We conclude ... that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith.[262]

The *Coffin* court did not expressly invoke natural law, but cases on which it relied did.[263] In upholding an equitable interest in an easement for a jointly constructed irrigation ditch to satisfy appropriative rights, Colorado Chief Justice Thatcher wrote: "[W]here the climatic conditions are such as exist in Colorado, the right to convey water for irrigating purposes over land owned by another is founded on *the imperious laws of nature*, with reference to which it

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of the soil, for agricultural purposes.

6 Colo. at 450. Another section of the territorial statutes provided:

> Nor shall the water of any stream be diverted from its original channel to the detriment of any miner, millmen or others along the line of said stream, and there shall be at all times left sufficient water in said stream for the use of miners and farmers along said stream.

Id. at 450-51. Both provisions appear to support the prevailing doctrine in which those who hold riparian property are entitled to the use of the stream, for legitimate purposes, unimpaired by those who seek to divert water from the stream channel.

261. *See id.* at 451.

262. *Id.* at 446-47 (emphasis added); *see also id.* at 446 ("But we think the [prior appropriation] doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity.").

263. *See id.* at 447.

must be presumed the government parts with its title."[264] In upholding an unwritten easement for an irrigation ditch against a claim that it violated the statute of frauds, however, the Colorado Supreme Court distinguished traditional natural law applicable to human morals from a form of natural law tied more closely to the law of nature:

> The principles of the decalogue may be applied to the conduct of men in every country and clime, but rules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence.
>
> In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims the recognition of the law.[265]

Thus, both the California and Colorado courts treated water appropriation as a preexisting right, independent of positive law.[266] Both courts based their decision as much on the human relationship to the natural world as on universal aspects of human relations,[267] in what in some respects was a prepolitical society during western settlement. This could reflect either a variation on natural law, or common law in which courts modified positive law to fit different geographic and hydrological conditions.

The U.S. Supreme Court invoked natural law more explicitly to ascertain the rights of individuals to appropriate water from public lands. In *Broder v. Natoma Water & Mining Co.*,[268] Justice Miller construed a federal statute granting land rights to a railroad[269] as

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264. Schilling v. Rominger, 4 Colo. 100, 109 (1878) (Thatcher, C.J., concurring) (emphasis added).

265. Yunker v. Nichols, 1 Colo. 551, 553 (1872), *superseded by statute*, COLO. CONST. Art. II, § 15, *as stated in* Stewart v. Stevens, 15 P. 786, 789 (Colo. 1887); *see also Yunker*, 1 Colo. at 555 ("When the lands of this territory were derived from the general government, they were subject to the law of nature, which holds them barren until awakened to fertility by nourishing streams of water, and the purchasers could have no benefit from the grant without the right to irrigate them.").

266. *See generally supra* notes 243-65 and accompanying text.

267. *See supra* notes 243-65 and accompanying text.

268. 101 U.S. 274 (1879).

269. The statute in question provided:

> That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, *and*

recognizing a preexisting right to appropriate water from public lands:

> It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the [statute]. We are of opinion that the ... [A]ct ... was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one.[270]

Like the California and Colorado Supreme Courts, the *Broder* Court did not specify the source of this preexisting right, but it cited earlier decisions that expressly invoked the language of Locke's theory of natural property rights.[271] In *Atchison v. Peterson*,[272] Justice Field wrote: "And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor."[273] Thus, like the California and Colorado Supreme Courts, the U.S. Supreme Court recognized "pre-existing right[s]" to build canals and ditches on public land,

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> *the same are recognized and acknowledged by the local customs, laws, and the decisions of courts*, the possessors and owners of such vested rights shall be maintained and protected in the same.

Id. at 275 (quoting 14 Stat. 251) (emphasis added).

270. *Id.* at 276.

271. *See id.*

272. 87 U.S. (20 Wall.) 507 (1874).

273. *Id.* at 512-14, 516 (affirming the applicability of prior appropriation to miners in the arid west in contravention of the prevailing doctrine of riparian rights); *see also* Jennison v. Kirk, 98 U.S. 453, 459 (1878) (describing customary law of prior appropriation in mining camps as "part of the miner's nature.... [h]e had given the honest toil of his life to discover wealth."); Forbes v. Gracey, 94 U.S. 762, 765-67 (1876) (affirming state right to tax minerals extracted from federal public domain lands because they had become private property of "the man whose labor, capitol, and skill has discovered and developed the mine and extracted the ore or other mineral product"); Basey v. Gallagher, 87 U.S. (20 Wall.) 670, 681-82 (1874) (reaffirming holding and natural law reasoning of *Atchison*).

but more expressly grounded those rights in natural law.[274] According to the Court, Congress merely ratified those rights in subsequent positive law.[275]

2. The Analogy to Grazing Rights

Advocates of private grazing rights on public lands have cited the same right of appropriation as applies to water. Falen and Budd-Falen argued that grazing preferences under the Taylor Grazing Act and laws applicable to National Forest lands are a form of property right entitled to Fifth Amendment protection.[276] Stimpert asserted that grazing permits are a form of property entitled to procedural due process rights.[277] Nelson suggested that ongoing environmental problems could be resolved by clearer delineation of property rights in public land grazing.[278] Anderson and Hill argued that contractual or other sanctioned property interests would enhance economic efficiency of grazing resource use.[279] Despite substantial differences in these claims, they share several common themes that natural law ranch advocates have adopted.

First, natural law ranch advocates argue that just as settlers combined their labor with water for beneficial use in mining, growing crops, and watering livestock, ranchers grazed livestock on the public range before the federal government had a significant presence in the region, similarly entitling them to property rights.[280]

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274. *See Broder*, 101 U.S. at 276.

275. *See id.* at 275-76.

276. *See* Falen & Budd-Falen, *supra* note 21, at 522-24.

277. *See* Stimpert, *supra* note 21, at 509-17.

278. *See* Robert H. Nelson, *How to Reform Grazing Policy: Creating Forage Rights on Federal Rangelands*, 8 FORDHAM ENVTL. L.J. 645, 649-50 (1997).

279. *See* Terry L. Anderson & Peter J. Hill, *Cowboys and Contracts*, 31 J. LEGAL STUD. 489, 492-93 (2002).

280. *See* Falen & Budd-Falen, *supra* note 21, at 507-08, 520-21 (asserting that grazing rights arose due to prior use later recognized in federal permits and citing a 1905 report from a meeting between Forest Service and stockmen asserting prior appropriation and "law of occupancy" rights to graze); Anita P. Miller, *America's Public Lands: Legal Issues in the New War for the West*, 24 URB. LAW. 895, 898, 898 n.12 (1992) (explaining effort to link property rights to graze to appropriative water rights and citing speech by rancher Wayne Hage); Stimpert, *supra* note 21, at 485-89, 494-96 (arguing that the same rules of appropriation should apply to forage as to water and hard rock minerals); *see also* Harbison, *supra* note 54, at 466-67, 481 (arguing that courts have held erroneously that grazing permits and leases convey no property interests because those permits convey many of the "sticks in the bundle"

Whether they justify those rights under classical principles of natural law articulated by Aristotle, Locke, and Blackstone,[281] as a manifestation of the rule of capture in property law,[282] or even under Biblical principles dating to Abraham's well,[283] natural law ranch advocates assert property rights similar to those recognized in water.

Second, natural law ranch advocates argue that, just as western aridity and geography necessitated prior appropriation of water, range conditions made public land grazing imperative to the success of livestock operations in the region, dating to Spanish colonial and Mexican rule in the southwest.[284] As grazing economies developed, federal homesteading programs allowed settlers to acquire fee ownership, but only for parcels of limited size.[285] Given the acreage required to support cattle on western rangelands, an economically feasible solution was to use the acquired land as "base property," while using much larger areas of federal land for supplemental grazing.[286] Thus, they argue, just as prior appropriation was justified based on aridity and dispersed surface waters compared to the riparian east, public land grazing was necessitated by the lower productivity of western rangeland relative to those in lusher regions.[287] Of course, the same logic could be used to argue that grazing is not appropriate at all on public lands with sparse forage.

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of traditional property rights).

281. *See* Nelson, *supra* note 278, at 645-47 (citing natural law theorists from Aristotle to Aquinas and arguing that Locke's theory of property may apply equally to grazing as to other property, but that the same would be true for other public land uses as well); Stimpert, *supra* note 21, at 484-86, 495-96 (citing Blackstone and questioning why ranchers "were not given the full fruit of their labor"); *see also* Harbison, *supra* note 54, at 459 (quoting Adam Smith).

282. *See* Donahue, *supra* note 15, at 731-37 (explaining but not agreeing with the validity of the analogy to the rule of capture); Stimpert, *supra* note 21, at 485-87 (discussing prior appropriation as the logical outgrowth of the rule of capture, leading to property rights as "a common principle of American property law").

283. *See* Stimpert, *supra* note 21, at 484-85, 488 (arguing that property rights tied to labor date back to Abraham's well as recorded in the Bible).

284. *See Public Rangeland Management II*, *supra* note 50, at 22; Falen and Budd-Falen, *supra* note 21, at 512-24 (asserting that the federal government pledged to respect any associated property rights in the Treaty of Guadalupe Hidalgo); Stimpert, *supra* note 21, at 489-90.

285. *See Public Rangeland Management II*, *supra* note 50, at 16-22.

286. *See id.* at 22-30; *Public Rangeland Management I*, *supra* note 24, at 541-43; Donahue, *supra* note 15, at 735-36.

287. *See Public Rangeland Management II*, *supra* note 50, at 22; Falen & Budd-Falen, *supra* note 21, at 512-24; Stimpert, *supra* note 21, at 488-90.

Third, natural law ranch advocates assert that these imperatives of the western range led to customary practices that became—or should have become—accepted doctrine and are as entitled to retrospective legal recognition as was true for water.[288]

Why, then, should those resources be treated differently for purposes of enforceable property rights? In Part B, I present several reasons why the analogy is flawed, and why arguments posited on behalf of natural law ranch advocates fundamentally misconstrue key principles of natural law identified in Part I.

B. Positive Law and Public Resources

Despite the surficial appeal of the prior appropriation analogy, it does not support property rights to graze public lands. First, even if prior appropriation water law had roots in natural law, it was later ratified through positive law.[289] By contrast, the federal government chose a different positive law for grazing rights.[290] Second, it is unclear whether prior appropriation is a natural law or a positive law doctrine.[291] Third, even if prior appropriation has a natural law grounding, it must be applied consistently with natural law principles.[292]

1. The Intervention of Positive Law

The most straightforward way to refute the prior appropriation analogy is the intervention of positive law, in which the federal government adopted, through legislation and judicial interpretation, different policies regarding the use of water and forage resources on public lands. The federal government ceded most of its water claims

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288. *See* Anderson & Hill, *supra* note 279, at 499-508 (arguing that customary range rights later were recognized as property through local custom and later positive law); Falen & Budd-Falen, *supra* note 21, at 511-22 (tracing customary grazing patterns and practices and their evolution into legally recognized grazing preferences); Nelson, *supra* note 278, at 646-49 (arguing that customary grazing practices evolved into de facto rights); Stimpert, *supra* note 21, at 488-96 (arguing that customary practices justified but did not achieve adequate recognition of property rights to graze).

289. *See infra* Part II.B.1.a.

290. *See infra* Part II.B.1.b.

291. *See infra* Part II.B.2.a.

292. *See infra* Part II.B.2.b.

to the states, leaving each state free to adopt its own positive law governing water use and allocation.[293] State positive law largely embraced prior appropriation at the constitutional, legislative, and judicial levels.[294] For grazing resources, Congress adopted a different approach in the Taylor Grazing Act,[295] the Federal Land Policy and Management Act,[296] and other statutes and regulations.

a. Water Rights

Although one could interpret the evolution of western water law as an example of common law process,[297] for purposes of this Part, I assume that early prior appropriation doctrine reflected natural law. Subsequent to judicial recognition of preexisting customs and practices in the cases discussed above, however, western states embraced prior appropriation through positive law, to varying degrees relative to continued applicability of riparian rights. States did so via constitutional provisions,[298] legislation,[299] judicial action,[300] or a combination of the above.

More important was the manner in which federal legislation and judicial interpretations accepted state prior appropriation law. In *California Oregon Power Co. v. Beaver Portland Cement Co.*,[301] the U.S. Supreme Court invoked the natural law origins of prior appropriation, but also embraced the role of positive law in codifying those rights.[302] In *California Oregon Power Co.*, a riparian landowner argued that a federal land patent issued pursuant to the Homestead Act[303] incorporated riparian rights that protected them against water use by an appropriator.[304] The Court held that

293. *See infra* Part II.B.1.a.

294. *See infra* notes 297-300 and accompanying text.

295. *See* Taylor Grazing Act of 1934, 43 U.S.C. § 315 (2012).

296. *See* Federal Land Policy and Management Act, 43 U.S.C. §§ 1701, 1752 (2012).

297. *See supra* notes 181-83 and accompanying text.

298. *See, e.g.*, COLO. CONST. art. XVI, §§ 5-6; IDAHO CONST. art. XV, § 3; UTAH CONST. art. VII, § 1.

299. *See, e.g.*, UTAH CODE ANN. § 73-1-1 (LexisNexis 2018).

300. *See, e.g.*, Irwin v. Phillips, 5 Cal. 140 (1855); Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882); Stowell v. Johnson, 26 P. 290 (Utah 1891); Moyer v. Preston, 44 P. 845 (Wyo. 1896).

301. 295 U.S. 142 (1935).

302. *See id.* at 154-58.

303. Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862).

304. *Cal. Or. Power Co.*, 295 U.S. at 150-52.

Congress, in authorizing federal land patents, acquiesced in water rights acknowledged by the western territories and states based on appropriation of water and application to beneficial use, as accepted by local custom and practice.[305]

The Court went further, however, holding that Congress, in enacting section 1 of the Desert Lands Act,[306] "effected a severance of *all waters upon the public domain*, not theretofore appropriated, from the land itself."[307] This was an immensely consequential ruling. Under the Property Clause of the Constitution, Congress had plenary control over those lands, including their riparian water rights.[308] Under the Court's interpretation of section 1 of the Desert Lands Act, however, Congress relinquished its riparian water rights entirely, leaving the nature of water rights—on federal, state, or private lands—to the discretion of each state.[309]

The Supreme Court in *California Oregon Power Co.* retained the reasoning in *Broder* that the Desert Lands Act merely recognized existing appropriative rights.[310] The Court quoted *Broder* for the proposition that all prior patents issued during this period were subject to this "existing servitude."[311] Similarly, the Court invoked the California and Colorado Supreme Courts' reasoning in describing the nature of the land and the essential labor deployed by settlers as justification for the holding.[312]

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305. *See id.* at 154-55.

306.

> [A]ll surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377, 377 (codified at 43 U.S.C. § 321 (2012)).

307. *Cal Or. Power Co.*, 295 U.S. at 158 (emphasis added).

308. *See* U.S. CONST. art. IV, § 3, cl. 2.

309. *See Cal. Or. Power Co.*, 295 U.S. at 162-64.

310. *See id.* at 154 ("The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well.").

311. *See id.* at 155.

312. *See id.* at 156-57 ("In the beginning, the task of reclaiming this area was left to the unaided efforts of the people who found their way by painful effort to its inhospitable solitudes. These western pioneers, emulating the spirit of so many others who had gone before them in similar ventures, faced the difficult problem of wresting a living and creating homes

The Supreme Court invoked positive law, however, to determine whether Congress, in homestead statutes, acquiesced in the practice: "This general policy was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866."[313] In extending the recognition to future patents, under all federal land disposal statutes, the Court held:

> If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters in so far as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result.[314]

Moreover, to the extent that Justice Sutherland cited arid western conditions and the extreme efforts necessary to wrest a living from those lands through hard labor and capital investment,[315] he did so as an interpretive tool to ascertain the intent of Congress in adopting the Desert Land Act.[316] He did not assert (as was true in

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from the raw elements about them, and threw down the gage of battle to the forces of nature. With imperfect tools, they built dams, excavated canals, constructed ditches, plowed and cultivated the soil, and transformed dry and desolate lands into green fields and leafy orchards."); *see also id.* at 157-58 ("[T]he future growth and well-being of the entire region depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water. The streams and other sources of supply from which this water must come were separated from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in the processes of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation.").

313. *Id.* at 154. The applicable section of the Mining Act of 1866 provided:

> [W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.

Id. at 154-55 (quoting Mining Act of 1866, ch. 262, § 9, 14 Stat. 251, 252 (1866)).

314. *Id.* at 155; *see also id.* at 159-63 (discussing the authority of the federal government to consent to the severance of water from the public domain and the federal government's intent to do so through legislation).

315. Justice Sutherland came from Utah, a prior appropriation state.

316. *See Cal. Or. Power Co.*, 295 U.S. at 156-57.

Broder[317]) that the right of appropriation arose under natural law, and therefore was something Congress must accept.[318]

The Court also adopted a positive law approach in its second major holding in *California Oregon Power Co.*, that in enacting section 1 of the Desert Land Act, Congress ceded governmental authority over water rights (in addition to federal ownership) to the states.[319] Although the Court discussed arid western conditions to explain congressional abandonment of riparian rights, congressional severance of water from the public domain left each state free to adopt water law suitable to its circumstances.[320] In the federal reserved water rights doctrine, the federal government later reinforced the concept that it was, through positive law, making affirmative policy decisions about the degree to which water would be available for appropriation by private individuals.[321] Although adopted by judicial decision rather than legislation, this doctrine held that the federal government, in reserving lands for specified uses, impliedly reserved sufficient water for the purposes of the reservation.[322]

Thus, the evolution of water law from the late eighteenth to the early nineteenth centuries reflected a classic evolution from natural law to positive law reasoning. Appropriative rights may have been based initially on Locke's theory of property, or they may have

317. *See supra* notes 268-70 and accompanying text.

318. *See Cal. Or. Power Co.*, 295 U.S. at 156 ("For the light which it will reflect upon the meaning and scope of that provision [of the Desert Land Act] and its bearing upon the present question, it is well to pause at this point to consider the then-existing situation with respect to land and water rights in the states and territories named."); *id.* at 158 ("In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed.").

319. *See id.* at 163-64.

320. *See id.* at 162 (holding that the effect of severing water from the public lands was "that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named"); *id.* at 163 (clarifying that the Court's holding did not have "the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest"); *id.* at 164 (upholding "the right in each [state] to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain"). The states' freedom to adopt suitable water policy explains the many variations of prior appropriation and mixtures of appropriative and riparian rights in different western states. *See* ADLER ET AL., *supra* note 49, at 87-109.

321. *See* Winters v. United States, 207 U.S. 564, 577 (1908).

322. *See id.* at 575-77 (holding that the United States, in creating Indian Reservations, impliedly reserved sufficient water for the resident tribes to live on that land).

simply reflected local "custom and practice." Either way, states retained those rights as a deliberate policy choice through judicial or legislative decisions.[323] Likewise, federal courts held that Congress ceded control over water rights on public lands as a conscious policy choice.[324]

b. Grazing Rights

During the cattle boom of the nineteenth and early twentieth centuries, federal public lands not reserved for specific purposes were available for use by ranchers and others.[325] Those lands remained open for grazing according to local custom and practice, with the tacit consent of the federal government,[326] before they were withdrawn from the public domain and reserved for particular purposes.[327] Just as courts justified prior appropriation based on arid western conditions, courts explained the need for grazing on public land based on the forage needs of large herds of livestock on lands with sparse forage.[328] That was especially important given the limited size of homesteads that ranchers could obtain in fee under federal land disposal policies. For several reasons, however, the analogy between prior appropriation in water law and in public grazing law, and the resulting implications for property rights, is inapt.

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323. *See supra* Part II.A.1.

324. *See* Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 256-57.

325. *See Public Rangeland Management I*, *supra* note 24, at 548-49; *Public Rangeland Management II*, *supra* note 50, at 23-24, 27-29; Donahue, *supra* note 15, at 737-40; Stimpert, *supra* note 21, at 492.

326. *See* Buford v. Houtz, 133 U.S. 320, 326-27 (1890).

327. *See* Pub. Lands Council v. Babbitt, 529 U.S. 728, 731-33 (2000) (regarding lands withdrawn pursuant to the Taylor Grazing Act); Light v. United States, 220 U.S. 523, 535-37 (1911) (regarding lands withdrawn for National Forest reserves).

328. *See Light*, 220 U.S. at 535 (stating that the common law rule "was not adapted to the situation of those States where there were great plains and vast tracts of unenclosed land, suitable for pasture"); *Buford*, 133 U.S. at 328 (noting that common law rule regarding grazing enclosures "was ill-adapted to the nature and condition of the country at that time"); Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 311 (D.C. Cir. 1938) (noting "[t]he sparsity of grass and forage in the region" as requiring large tracts to sustain livestock on the public domain).

First, even when unreserved federal lands remained open, the Supreme Court recognized only an implied license to graze until Congress prohibited it:

> [T]here is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.[329]

Later cases affirmed that the United States merely suffered the use of public lands for grazing through tacit acquiescence, and that such acquiescence was revocable at will.[330]

Second, although natural law ideology might have persuaded Congress to recognize property rights in public grazing, it chose not to do so. Congress did not, in any statute analogous to the Desert Lands Act,[331] sever forage from public lands in the same way it did with water, or accept the appropriation doctrine to confer property rights to forage.[332] To the contrary, when Congress enacted laws to govern federal land, it revoked the implied license to graze[333] and replaced the implied license with grazing permits and leases issued by federal land managers.[334] In doing so, Congress expressly provided that grazing permits convey no property rights in federal land.[335]

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329. *Buford*, 133 U.S. at 326; *see also Light*, 220 U.S. at 535.

330. *See* Omaechevarria v. Idaho, 246 U.S. 343, 352 (1918) ("The [g]overnment has merely suffered the lands to be so used."); *Light*, 220 U.S. at 535 (finding only an implied license to graze that did not "deprive the United States of the power of recalling" that license); Osborne v. United States, 145 F.2d 892, 894-95 (9th Cir. 1944).

331. *See supra* notes 306-07 and accompanying text.

332. *See* Stimpert, *supra* note 21, at 503-04 (citing a report that stated that grazing districts "were removed from private appropriation").

333. *See* Chournos v. United States, 193 F.2d 321, 323-24 (10th Cir. 1952) (rejecting a rancher's claim to use of public land without a permit).

334. *See id.* at 323 (confirming discretionary nature of permit system under Taylor Grazing Act). Others describe the mechanics of those regulations in detail. *See Public Rangeland Management II, supra* note 50, at 51-100; Joseph M. Feller, *What Is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 563-83 (1994); Hillary M. Hoffmann, *A Changing of the Cattle Guard: The Bureau of Land Management's New Approach to Grazing Qualifications*, 24 J. ENVTL. L. & LITIG. 243, 250-80 (2009).

335. *See* 43 U.S.C. § 315(b) (2012) ("So far as consistent with the purposes and provisions

Courts have confirmed that grazing permits convey no legally cognizable property rights, and are revocable at the federal government's discretion.[336] Moreover, courts upheld plenary federal authority over public rangelands under the Property Clause, first to prohibit physical enclosures and other methods used by some ranchers to monopolize public range,[337] and later to regulate grazing on federal lands to allocate forage resources and to protect other resources.[338]

Ironically, both opponents[339] and proponents[340] of property rights to graze public lands agree that the unregulated implied license to graze recognized in *Buford* was not sustainable. With dramatically expanding grazing intensity in the nineteenth and early twentieth centuries, laissez-faire policy caused widespread deterioration of public rangelands and related environmental problems, and livestock industry instability due to the resulting uncertainty about

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of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.").

336. *See* United States v. Fuller, 409 U.S. 488, 489, 493-94 (1973); United States v. Estate of Hage, 810 F.3d 712, 716-17 (9th Cir. 2016); Fed. Lands Legal Consortium v. United States, 195 F.3d 1190, 1196 (10th Cir. 1999) (holding that modification of grazing permits did not deny procedural due process because grazing permits confer no property interest); Diamond Ring Ranch, Inc. v. Morton, 531 F.2d 1397, 1404 (10th Cir. 1976); *Chournos*, 193 F.2d at 323 ("[A] livestock owner does not have the right to take matters into his own hands and graze public lands without a permit."); United States v. Cox, 190 F.2d 293, 295-97 (10th Cir. 1951). *But see* Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 315-16 (D.C. Cir. 1938) (holding that, although grazing permits convey no vested property rights, they are of sufficient value to warrant equitable protection in proper circumstances); Shufflebarger v. Comm., 24 T.C. 980, 992 (1955) (holding that grazing preference is property for tax purposes).

337. *See* McKelvey v. United States, 260 U.S. 353, 359 (1922) (upholding conviction for using force to prevent passage over federal lands); Camfield v. United States, 167 U.S. 518, 525-26 (1897) (upholding federal statute prohibiting fences and other enclosures that restrict public land access). Even before Congress adopted the Unlawful Enclosures Act, the Supreme Court rejected efforts by some ranchers to obtain monopoly control over public range resources, effectively rejecting a "rule of capture" theory of public land use and ownership acquisition. *See* Buford v. Houtz, 133 U.S. 320, 325-26 (1890).

338. *See* Pub. Lands Council v. Babbitt, 529 U.S. 728, 739-44 (2000) (upholding Bureau of Land Management regulations limiting grazing); *Diamond Ring Ranch*, 531 F.2d at 1401-04 (upholding federal authority to suspend or revoke grazing permit due to violations of regulations and permit conditions).

339. *See Public Rangeland Management II*, *supra* note 50, at 3, 31-32; Donahue, *supra* note 15, at 724-27; Feller, *supra* note 334, at 560-63.

340. *See* Harbison, *supra* note 54, at 467-69; Nelson, *supra* note 278, at 649-50; Stimpert, *supra* note 21, at 488-93.

grazing rights.[341] In short, the public commons approach to federal land[342] management led to a "tragedy of the commons."[343] During the Dust Bowl, ranchers were among the most ardent proponents of public range reform and allocated grazing.[344] Regardless of how one reads the history, Congress made a positive policy choice to regulate public land use.[345] Natural law ranch advocates remain free to advocate for change in that positive law, but they have not prevailed in those policy arguments.[346]

In the face of this positive law, the only claim available to natural law ranch advocates is that natural law *obligated* the federal government to recognize property rights to graze in ranchers who labored to put federal land to beneficial use during the open access period. As discussed earlier, however, the U.S. Constitution is the supreme law of the land.[347] Although judges might rely on natural law to decide common law cases not otherwise addressed by positive law, to interpret constitutional ambiguities, or to apply principles of equity, natural law cannot supplant binding positive law.[348] The only possible contrary arguments are that natural law sheds light on unenumerated rights preserved by the Ninth Amendment,[349] or that property rights to graze are fundamental liberty interests protected by the Fourteenth Amendment.[350] Even if one believes in the viability of natural law in establishing constitutional rights, however, the argument is weak here.

The strongest potential support for the natural law argument is Justice Miller's statement in *Broder v. Natoma Water & Mining Co.* that congressional acceptance of prior appropriation reflected "a

341. *See Pub. Lands Council*, 529 U.S. at 731-33.

342. *See Buford*, 133 U.S. at 327 (referring to the public range as a "public common").

343. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) (arguing that grazing in a commons, and other common use of public resources, is sustainable only under conditions of low density because each individual reaps the full profit from adding more livestock while bearing only a fraction of the environmental costs of doing so).

344. *See Public Rangeland Management II*, *supra* note 50, at 42-47 (tracing the legislative history of the Taylor Grazing Act and the evolution of ranchers' position from seeking transfer of exclusive rights to acceptance of regulatory regime).

345. *See supra* notes 297-300 and accompanying text.

346. *See generally supra* text accompanying notes 37-47.

347. *See supra* note 146 and accompanying text.

348. *See supra* Part I.D.

349. *See supra* notes 215-19 and accompanying text.

350. *See supra* notes 209-14 and accompanying text.

voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, [rather] than the establishment of a new one."[351] Given that Justice Miller cited this rationale to explain statutory recognition of those rights, that statement is dictum at best. It was also consistent with the prevailing judicial method to bolster positive law rulings with natural law reasoning.[352] More importantly, however, later statutes and judicial decisions, including Justice Sutherland's majority opinion in *California Oregon Power Co.*, established that Congress severed water rights from the public domain under its positive law authority in the Property Clause.[353] Moreover, the federal government affirmatively reserved to the states the beds and the banks of navigable waters, but not other federal lands.[354]

The second possible basis for property rights claims to federal grazing resources, analogous to that in *Griswold* and progeny, is that appropriative property rights arise out of other rights protected by the Constitution, or a "penumbra" emanating from those rights, under preexisting natural law rights and principles encompassed by the Ninth Amendment.[355] Even without trying to resolve "the *Griswold* problem,"[356] this argument is weak because it is difficult to find even the penumbra underlying such a right. The Fifth and Fourteenth Amendments prohibit the federal and state governments, respectively, from taking private property without due process and just compensation.[357] Those protections, however, apply only to property recognized by positive law.[358] The takings provisions of the

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351. Broder v. Natoma Water & Mining Co., 101 U.S. 274, 276 (1879); *see supra* note 245 and accompanying text.

352. *See supra* notes 178-79 and accompanying text.

353. *See supra* notes 301-02 and accompanying text.

354. *See* Pollard v. Hagan, 44 U.S. (3 How.) 212, 230 (1845).

355. *See supra* notes 216-27 and accompanying text.

356. *See supra* note 215 and accompanying text.

357. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

358. *See* Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 494 (2000) (asserting "[p]roperty ... owes both its existence and its contours to positive law, local positive law. Property simply does not exist in the absence of state law," and distinguishing property from individual liberty and racial equality, which are "determined without regard to *current* legal facts" (footnotes omitted)); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 304-05 (1993) (arguing that liberty is an intuitive concept and a "*naturalistic*" rather than "positivistic" norm, while "property *cannot* stand while the laws fall"); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings*

Constitution do not dictate what property rights states or the federal government must recognize,[359] and the Supreme Court has rejected the idea that grazing on federal land is the kind of property subject to Fifth Amendment protection.[360] Even in the context of appropriative water rights, which are usufructuary rather than fee in nature,[361] courts have struggled with the degree to which those rights are entitled to takings protections.[362]

Moreover, the positive law in the Constitution dictates that Congress has plenary authority to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[363] The Supreme Court has held that the federal government holds said land in trust for all citizens, and that the courts have no authority to question policy decisions by the elected branches about the appropriate use and disposition of lands subject to that trust.[364] Thus, the Property Clause created a far different vision of how public lands would be held in this country, and for what purposes, relative to Crown lands in England.[365]

2. Relevance of Natural Law

A second response to the prior appropriation analogy is that natural law—even if applicable to grazing—does not support the claims of natural law ranch advocates. First, prior appropriation

Jurisprudence, 114 YALE L.J. 203, 222 (2004) (arguing that the definition of property rights has generally been left to the states, and "if state law did not create property in the first instance, then subsequent state action cannot take property").

359. *See* Colvin Cattle Co. v. United States, 468 F.3d 803, 806-08 (Fed. Cir. 2006).

360. *See* United States v. Fuller, 409 U.S. 488, 493 (1973).

361. *See* ADLER ET AL., *supra* note 49, at 1, 154.

362. *Compare* Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 455-58, 472-73 (2011) (affirming that appropriative water rights are subject to Fifth Amendment protection, but scrutinizing the exact nature of the usufructuary property right to determine that no taking occurred), *with* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 320, 324 (2001) (finding that Endangered Species Act restrictions on water use constituted a physical taking requiring just compensation).

363. U.S. CONST. art. IV, § 3, cl. 2.

364. *See* Light v. United States, 220 U.S. 523, 537 (1911).

365. *See id.* at 536 ("[T]he 'United States does not and cannot hold property as a monarch may for private or personal purposes.'" (quoting Van Brocklin v. Tennessee, 117 U.S. 151, 158 (1886))).

may more properly reflect positive law than natural law.[366] Second, there is a compelling argument that natural law applies differently to forage than to water.[367] Because natural law has evolved and has always been interpreted according to current societal needs and conditions,[368] any application of natural law must reflect the needs and interests of the American public with respect to public lands held in trust for all of them.[369]

a. Applicability of Natural Law

Justices Field and Miller justified prior appropriation in Lockean natural law terms.[370] Professor Donahue discussed water law (as well as mining law and timber law) as a manifestation of the rule of capture.[371] Her counterpart Marc Stimpert agreed, but argued that the same principles should apply to forage resources.[372] Professor Richard Epstein, however, has suggested the opposite interpretation: that the natural flow doctrine of riparian rights[373] reflected natural law,[374] while the reasonable use variation of riparian rights and the prior appropriation doctrine are examples of positive law, created judicially and legislatively to address different economic, environmental, and other circumstances.[375]

Under Epstein's application of the view of natural law as predating the state and reflecting "prepolitical" rights and duties, water sources were res commune[376]: "Take a plot of land and it is yours. Stick a cup in the river, and the water you have drawn out is yours as well."[377] The prepolitical rule allowed usufructuary water

366. *See infra* Part II.B.2.a.
367. *See supra* Part II.B.1.b.
368. *See supra* Part I.D.
369. *See infra* Part II.B.2.b.
370. *See supra* notes 268-75 and accompanying text.
371. *See* Donahue, *supra* note 15, at 731-33.
372. *See* Stimpert, *supra* note 21, at 488, 517.
373. *See* ADLER ET AL., *supra* note 49, at 46-47 (explaining the evolution of riparian rights from natural flow to reasonable use doctrine).
374. *See* Epstein, *supra* note 85, at 2350-52.
375. *See id.* at 2356-59.
376. Referring to resources not owned by any individual but owned in common, as distinguished from res nullius resources that are not held in common, but owned by no one until reduced to individual ownership via occupation or capture. *See id.* at 2342-43.
377. *Id.* at 2350.

rights so long as intensity of use did not deplete the stream value for common purposes such as navigation, recreation, and fishing.[378] This fits squarely within Locke's theory of property: the labor needed to withdraw water from its source, combined with the value of the water, gives rise to usufructuary riparian property rights.[379] Yet Locke also admonished that this right extends only to as much as any person needs, not so far as to injure common rights to benefit from the same resource.[380]

Under this Lockean theory, natural law riparian rights worked well in a preindustrial world with low population density and low-intensity water uses.[381] Professor Epstein argues that intensified water uses required modification of riparian doctrine via positive law (through common law decisions[382] or legislation and regulation[383]) to the "reasonable use"[384] variation of riparian rights.[385] This made sense in an industrializing world in which economic uses of water were essential.[386] Natural flow doctrine required no state intervention because water use was limited to riparian land ownership; hence the rule was self-executing or enforceable by custom.[387] Reasonable use doctrine required state action—via adjudication or regulation—to determine what uses were reasonable, where, and in

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378. *See id.* at 2345, 2351. A "usufructuary" property right allows use but not full ownership or occupation; for example, the right to pick and eat fruit but not to own the tree. *See id.* at 2345. In the context of usufructuary rights, a subtler distinction is that a water source is res commune, while discrete amounts of water within that source are res nullius.

379. *See* LOCKE, *supra* note 92, at 134-35.

380. *See id.* at 136-37. A strict libertarian analysis struggles with the extent to which individual appropriation of a common resource increases that individual's liberty at the expense of the liberty of others to use the same resource. *See* NOZICK, *supra* note 85, at 174-82.

381. *Cf. supra* notes 342-43 and accompanying text.

382. *See generally*, ADLER ET AL., *supra* note 49, at 46-47 (explaining the common law shift from natural flow to reasonable use doctrine).

383. *See generally id.* at 243-54 (explaining the shift to "regulated riparianism").

384. *See id.*

385. *See* Epstein, *supra* note 85, at 2362.

386. *See, e.g.*, Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827) No. 14,312 (explaining that strict application of natural flow doctrine "would be to deny any valuable use" of water, thereby justifying reasonable use principle).

387. *See id.* at 2352-55. This part of Epstein's claim may be overstated, because judicial intervention may be needed if a riparian claims another user interfered with the plaintiff's use. *See, e.g.*, Adams v. Greenwich Water Co., 83 A.2d 177, 179 (Conn. 1951) (filing suit to enjoin the city from taking water in amounts that interfered with plaintiffs' riparian water rights).

which amounts.[388] Likewise, Epstein identifies prior appropriation as a positive law response to the poor fit between riparian doctrine and the geographic and hydrological conditions of the west, with its aridity and large distances between rivers.[389]

Prior appropriation, however, can also be explained as natural law. Professor Epstein delineates natural law as law in which "emergent customs and practices in the state of nature cannot be treated as a consequence of conscious deliberation and supervision by the state."[390] Early prior appropriation judicial decisions relied on customary practices that evolved, absent formal state action, to allocate a scarce resource among competing users, and on rights that predated formal legal creation.[391] Justice Field and others indicated that appropriative water rights derive from Locke's theory of property and other natural law principles.[392]

Perhaps Justice Field and colleagues were simply wrong. They operated in a period dominated by natural law, and habitually justified the results they found appropriate through natural law reasoning.[393] If Professor Epstein is correct, those jurists incorrectly explained prior appropriation by reference to natural law, when in fact they were exercising positive-law judicial authority, or interpreting positive statutory law to replace the natural law doctrine of riparian rights to suit new circumstances. If so, there is no longer a sound basis to argue that natural law justifies equal treatment of grazing and other public resources because appropriation of those resources similarly generated a preexisting right that courts must uphold and protect. The federal government, exercising positive-law authority under the Property Clause, made different policy decisions that best effectuated the public trust in public lands.

388. *See supra* note 382 and accompanying text.

389. *See* Epstein, *supra* note 85, at 2359-60; *supra* Part II.A.1 (describing early prior appropriation decisions).

390. Epstein, *supra* note 85, at 2343.

391. *See supra* notes 84-85 and accompanying text.

392. *See supra* notes 268-75 and accompanying text.

393. *See supra* Parts I.C., II.A.1.

b. Application of Natural Law

A second possible explanation is equally fatal to the argument that natural law obligates the federal government to recognize appropriative rights to forage. If *both* riparian rights and prior appropriation can be explained by natural law, then there is no universal principle of natural law relevant to this issue, equally appropriate to all human societies and contexts based on a single prototype of prepolitical human existence. The natural interaction of humans with the environment, and therefore the customary, prepolitical modes of resource allocation predating formal legal recognition through positive law, vary based on different environmental circumstances. This is consistent with the principle identified in Part I that natural law has not been interpreted and applied uniformly over time.[394] Rather, through positive law, different polities adopted differing applications of natural law to suit particular conditions.[395]

Indeed, as societies evolved from prepolitical to political, the concepts of res nullius, res commune, and res publica developed to distinguish between land and other resources held in common, but for different purposes. Res nullius refers to property not owned by anyone,[396] and therefore available to individuals to reduce to private ownership (res privata) through labor. This could apply to homesteading of unused land,[397] capture of wildlife,[398] or mining of fugitive minerals.[399] Res commune applies to resources owned commonly for mutual benefit, such as a river under the natural flow doctrine of riparian rights, which individuals may use for specific purposes so long as they do not harm the res for use by others and the public at large.[400] That made sense for rivers, from which water might beneficially be used (for drinking, watering crops and livestock, or running a mill), but where sufficient amounts must remain

394. *See supra* Part I.D.

395. *See supra* Part I.D.

396. *See* Toomer v. Witsell, 334 U.S. 385, 399 (1948) (explaining principle of res nullius in the context of wild animals (or ferae naturae)).

397. *See* Scott v. Powell, 182 F.2d 75, 81 (D.C. Cir. 1950) (explaining that land can never be res nullius, except for presocietal or undiscovered land).

398. *See* Pierson v. Post, 3 Cai. 175, 178-79 (N.Y. Sup. Ct. 1805).

399. *See* Brown v. Spilman, 155 U.S. 665, 669-70 (1895).

400. *See supra* notes 376-77 and accompanying text.

to support public navigation and fisheries.[401] Res publica refers to resources intended for use by all, such as a public square, park, or commons. All are consistent with the evolution of property from a prepolitical to a political world, in which different resources fit within each category, and different societies may decide how to allocate resources through different systems of positive law.

That is exactly how the federal government, through positive law, adopted a different policy for water than for other resources. Although it is not essential to this analysis whether one agrees with those federal policy decisions, the distinctions are logical. Given the mobility of water and the fact that state law governed water use elsewhere in the state, it was logical for Congress to sever water from public lands so that all water could be managed through an integrated legal system in each state, rather than recognizing one form of water rights on federal land and another on state or private land.[402] The federal government protected its interests in waterways by retaining ownership of the beds and banks of nonnavigable waterways on federal land,[403] through judicial adoption of the federal reserved rights doctrine,[404] and through the federal navigational servitude on navigable waters—a doctrine that protects the res commune in those waterways.[405]

The federal government's decision to retain fee ownership in large tracts of public land reflected an equally rational decision that they were best managed as res commune because they were valuable to different people for different uses at various times and places,[406] or in some cases, as res publica under particular statutory authority.[407]

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401. *See supra* notes 376-80 and accompanying text.

402. The limited exception, noted above, is the federal reserved water doctrine. *See supra* note 322 and accompanying text.

403. *See* PPL Mont., LLC, v. Montana, 565 U.S. 576, 591 (2012) (confirming that the United States retains title to lands beneath nonnavigable waters).

404. *See supra* notes 322-23 and accompanying text.

405. *See* United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 63 (1913) ("All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution.").

406. Under the same logic, other public lands users could assert property interests because they reaped public land values through labor, such as hiking. *See* Harbison, *supra* note 54, at 463.

407. Congress can set aside federal land as a National Park, *see* 54 U.S.C. § 100101 (Supp.

Bureau of Land Management manages most of those lands for multiple uses pursuant to the Federal Land Policy and Management Act,[408] but since 1934 they have continued to be available to ranchers for public forage under the Taylor Grazing Act, with preferences to ranchers with adjacent base property, water rights, prior use, and other factors.[409]

CONCLUSION

A. Refuting the Prior Appropriation Analogy

Despite its facial appeal, reliance on natural law to support political agendas, in the western public lands debate or otherwise, is misplaced and potentially dangerous. It ignores the history of U.S. jurisprudence and foundational principles of republican democracy.

The simple response to the prior appropriation analogy is that, to the extent that natural law drove the evolution of the prior appropriation doctrine in mid-nineteenth-century water law, it occurred in the *absence* of positive law governing allocation of water.[410] Through subsequent legislation or adjudication, all western states adopted various versions of appropriative water rights into their positive law, and the federal government expressly ratified state authority to do so.[411]

Although the federal government might have decided to apply similar natural law principles to grazing rights, it elected not to do so. Instead, the federal government made different policy choices in positive laws governing those resources, consistent with the needs and conditions of the United States and its citizenry.[412] Most notably, in the Taylor Grazing Act of 1934, Congress rejected the appropriation doctrine in favor of a permit system governing public grazing resources.[413]

II 2012), a National Forest, *see* 16 U.S.C. § 473 (2012), or a wilderness area, *see* 16 U.S.C. § 1131 (2012). The President may reserve National Monuments. *See* 54 U.S.C. § 320301 (Supp II 2014).

408. *See* 43 U.S.C. § 1732(a) (2012).

409. *See id.* § 315.

410. *See supra* Part II.A.1.

411. *See supra* Part II.B.1.a.

412. *See supra* Part II.B.1.b.

413. *See* § 315(b).

A prior appropriation approach to grazing can prevail only if those positive law enactments are superseded by principles of natural law, which is exactly what the Malheur and Bunkerville defendants suggested in their assertion of "God-given rights."[414] The predominant interpretation of U.S. legal history, however, is that positive law has supplanted natural law as the means by which we establish legal rights and obligations.[415] To the extent that courts can review positive law established by lower courts or legislatures, the federal and state constitutions are the only standard against which legitimacy is judged, not abstract principles of natural law.[416]

Even if one accepts the continuing relevance of natural law, that doctrine itself does not support the right of individuals to declare their own interpretation of natural law, leaving them free to disobey positive law.[417] Positive law is the means by which societies establish binding rules, whether or not those rules are influenced by natural law.[418] That is the most fundamental foundation on which civil society rests. If individuals or groups wish to change prevailing positive law, they must do so through lawful means.[419] In the United States, we do so through the democratic and legal institutions established in the federal and state constitutions.[420] Although there is a longstanding tradition of using civil disobedience to challenge existing positive law when lawful means of law reform fail,[421] proponents of that strategy must accept the legal consequences of their actions.[422] Otherwise, their reliance on natural law promotes anarchy rather than law.[423]

B. The Public Trust Analogy

For those who prefer a more protective approach to public land and water management, and other aspects of environmental

414. *See* June, *supra* note 3.
415. *See supra* Part I.B-C.
416. *See supra* notes 117-19 and accompanying text.
417. *See supra* notes 70, 74 and accompanying text.
418. *See supra* note 73.
419. *See supra* notes 93-95.
420. *See supra* notes 117-19.
421. *See supra* notes 93-95 and accompanying text.
422. *See supra* notes 233-34 and accompanying text.
423. *See supra* notes 70, 74 and accompanying text.

protection, the view that positive law has replaced natural law presents a similar dilemma. Some proenvironment scholars have argued for an inherent right to a clean environment,[424] or for fundamental rights to clean water and other essential environmental resources.[425] Most notably, the classic statement of the public trust doctrine sounds in the language of natural law.[426] Public trust principles have been invoked to modify prior appropriation rights established by positive law,[427] and to support protection of a range of environmental resources beyond the original contours of the doctrine.[428] Conservative scholars have sought to restrict the public

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424. *See, e.g.*, James R. May, *Symposium on Global Environmental Constitutionalism: An Introduction and Overview*, 21 WIDENER L. REV. 139, 139-40 (2015); Erin Daly, *Environmental Human Rights: Paradigm of Indivisibility* 13 (Widener Law Sch. Legal Stud., Res. Paper No. 11-05), http://ssrn.com/abstract=1743610 [https://perma.cc/G6KS-ZXGT].

425. *See, e.g.*, Jernaj Letnar Černič, *Corporate Obligations Under the Human Right to Water*, 39 DENV. J. INT'L L. & POL'Y, 303, 310-15 (2011); David Zetland, *Water Rights and Human Rights*, FORBES (Mar. 25, 2010, 10:00 AM), https://www.forbes.com/forbes/2010/0412/opinions-sanitation-haiti-human-rights-on-my-mind.html [https://perma.cc/A7JE-UWNK]; David Zetland, *Water Rights and Human Rights: The Poor Will Not Need Our Charity if We Need Their Water*, JOHNS HOPKINS WATER MAG. (July 25, 2010), http://water.jhu.edu/index.php/magazine/water-rights-and-human-rights-the-poor-will-not-need-our-charity-if-we-need/ [https://perma.cc/TJH5-5VF3]. A recent report by a U.N. Special Rapporteur on Human Rights and the Environment identified a wide range of environmental protections owed by nation-states to ensure the human rights of its citizens. *See Special Rapporteur on Human Rights and the Environment*, U.N. HUM. RTS.: OFF. OF HIGH COMMISSIONER, https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx [https://perma.cc/KZZ7-K38A].

426. "By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea." J. INST 2.1.1. Although codification of the public trust doctrine might suggest positive law notwithstanding the reference to "the law of nature," the Institutes were simply a codification of those principles of law that had been assembled by Roman legal scholars near the end of the Roman Empire, regardless of their legal origins. *See* Ewa M. Davison, *Enjoys Long Walks on the Beach: Washington's Public Trust Doctrine and the Right of Pedestrian Passage over Private Tidelands*, 81 WASH. L. REV. 813, 830-31 (2006). *But see* Epstein, *supra* note 85, at 2343-44 (arguing that the public trust doctrine has been mischaracterized as being grounded in this Justinian source).

427. Nat'l Audubon Soc'y v. Superior Court of Alpine Cty, 658 P.2d 709, 728, 732 (Cal. 1983) (holding that California prior appropriation law embodied in the state constitution and state statutes must be balanced against principles derived from the public trust doctrine).

428. *See* Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 VT. L. REV. 81, 86, 94, 108 (1995) (arguing for the use of the doctrine to protect wetlands); Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 703, 708, 713 (1995) (explaining the expansion of the doctrine to address water allocation and quantity); Anna R. C. Caspersen, Comment, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 359-60, 378, 391 (1996) (suggesting

trust doctrine to its original contours in American or English positive law.[429]

Unless the public trust doctrine has a constitutional underpinning[430] or other source in positive law, consistency requires that the

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the applicability of the doctrine to protect wildlife); John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust*, 104 DICK. L. REV. 97, 100, 115, 118 (1999) (arguing that the public trust doctrine supports protection of Pennsylvania's environmental resources (citing PA. CONST. art. I, § 27)); Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485, 505, 511, 513 (1989) (proposing use of the doctrine to protect water quality); Ralph W. Johnson & William C. Galloway, *Protection of Biodiversity Under the Public Trust Doctrine,* 8 TUL. ENVTL. L.J. 21, 25, 29, 31 (1994) (discussing the utility of the doctrine to protect biodiversity). Most recently, environmentalists have advocated a public atmospheric trust to combat climate change with mixed judicial reactions. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1255 (D. Or. 2016), *appeal denied*, No. 6:15-cv-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017) (declining to decide whether the public trust doctrine extends to the atmosphere); Butler *ex rel.* Peshlakai v. Brewer, No. 1CA-CV12-0347, 2013 WL 1091209, at *6 (Ariz. Ct. App. Mar. 14, 2013) (assuming but not deciding that the public trust doctrine extends to the atmosphere, but dismissing on other grounds).

429. *See, e.g.*, James L. Huffman, *Why Liberating the Public Trust Doctrine Is Bad for the Public*, 45 ENVTL. L. 337, 374 (2015).

430. Federal courts have consistently rejected claims asserting a constitutional right to a clean environment. *See* Lake v. City of Southgate, No. 16-10251, 2017 WL 767879, at *4 (E.D. Mich. Feb. 28, 2017) (rejecting claim under 42 U.S.C. § 1983 that plaintiffs had a liberty interest and a "fundamental right" to health and freedom from bodily harm (citing Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971) ("[T]here is no constitutional right to a healthful environment."))); S.F. Chapter of A. Philip Randolph Inst. v. EPA, No. C 07-04936 CRB, 2008 WL 859985, at *7 (N.D. Cal. Mar. 28, 2008) (rejecting asserted rights to be free from climate change pollution and to have a certain quality of life); *In re* Agent Orange Prod. Liab. Litig., 475 F. Supp. 928, 934 (E.D.N.Y. 1979) ("[T]here is not yet any constitutional right ... to be free of the allegedly toxic chemicals involved in this litigation."); Pinkney v. Ohio EPA, 375 F. Supp. 305, 310 (N.D. Ohio 1974) ("[T]he Court is unable to rule that the right to a healthful environment is a fundamental right under the Constitution."); Tanner v. Armco Steel Corp., 340 F. Supp. 532, 537 (S.D. Tex. 1972) ("[N]o legally enforceable right to a healthful environment, giving rise to an action for damages, is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution."); *see also* Envtl. Def. Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 728, 739 (E.D. Ark. 1971). Two recent Pennsylvania Supreme Court decisions, however, invalidated provisions or applications of state statutes as violations of Article I, section 27 of the Pennsylvania Constitution, finding that the constitutional provision imposed public trust duties on the Commonwealth. *See* Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 939 (Pa. 2017) (invalidating the diversion of funds from oil and gas leases to nontrust purposes); Robinson Township v. Commonwealth, 83 A.3d 901, 978, 981, 985 (Pa. 2013) (plurality opinion) (invalidating provisions of the Pennsylvania Oil and Gas Act as providing insufficient protection of, or consideration of, environmental values). This unique state constitutional section provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including

doctrine be justified based on an analysis of natural law history and theory similar to that conducted above with respect to prior appropriation. This will be the subject of a future article.

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generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27.